(19,239.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 191.

ISAAC H. HARRIS, PLAINTIFF IN ERROR,

vs.

B. BALK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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1 In the Supreme Court of North Carolina.

Appeal from the Superior Court of Beaufort County.

B. BALK
vs.
ISAAC H. HARRIS. } Petition for Writ of Error.

Comes now the defendant, Isaac H. Harris, and says that in the above entitled cause, the said supreme court of North Carolina, at several times, to wit;—at the February term, 1898, at the February term, 1899, at the February term 1902, and at the February term, 1903, of said court, holden at the city of Raleigh, in the said State of North Carolina, upon appeals from the superior court of Beaufort county, North Carolina and upon petitions to re-hear, rendered judgments adverse to this petitioner, which said judgments, so rendered by the highest court of said State of North Carolina in which a decision in said cause could be had, have been made final within two years prior to the date of the filing of this petition.

That in the proceedings had and judgments rendered, certain errors were committed to the prejudice of this petitioner, all of which will appear more in detail in the assignment of errors filed with this petition.

Wherefore, the petitioner prays that a writ of error may issue to the Supreme Court of the United States for a correction of the errors complained of, and that duly authenticated transcripts of the records, proceedings and papers herein may be sent to the Supreme Court of the United States.

CHARLES F. WARREN,
G. W. S. MUSGROVE,
Attorneys for Isaac H. Harris.

STATE OF NORTH CAROLINA:

Desiring to give the petitioner an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition and in the assignment of errors filed herewith, it is hereby ordered that a writ of error be allowed to said court, and that the same be made a supersedeas upon the filing of a bond in the penalty of six hundred dollars, ($600.00), in the form and
2 with a surety to be approved by me.

29 May, 1903.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

UNITED STATES OF AMERICA:

Supreme Court.

ISAAC H. HARRIS, Plaintiff in Error,
vs.
B. BALK, Defendant in Error.
} Assignment of Errors.

In the case which was several times before the supreme court of North Carolina, entitled B. Balk *vs* Isaac H. Harris, and in the several judgments rendered therein, the plaintiff in error makes the following assignment of errors committed by the said supreme court of North Carolina, as appears by the record in said case,—that is to say:

That the point relied upon by the plaintiff in error throughout this litigation has been that certain proceedings had in the superior court of Baltimore city, wherein a judgment was rendered against the plaintiff in error at the suit of Jacob Epstein, form a complete bar to the action of the said B. Balk, the defendant in error, for the recovery of the sum in controversy, the said proceedings having been conducted and judgment rendered in strict accordance with the laws of the said State of Maryland.

That although the plaintiff in error filed as evidence in his behalf, a full and complete copy of the record of the said proceedings in said superior court of Baltimore city, duly exemplified, and introduced the statute law of the State of Maryland showing that the said proceedings were conducted and judgment rendered in exact conformity with the laws and practice of the said State of Maryland, yet the said supreme court of North Carolina, in rendering the judgments complained of, failed to give full faith and credit to the proceedings certified by the said Maryland court, and said decisions are against the title, right, privilege or immunity specially set apart and claimed by the plaintiff in error under article IV, section 1 of the Constitution of the United States, and that the question
3 of the recognition of the official acts of the Maryland court, as is shown by the record, arose directly as well as by clear and necessary intendment, so that said court erred in giving judgment in the manner and form set forth in the record and herein complained of.

To the end, therefore, that said error may be corrected by apt proceedings, and that the judgments so rendered by the said supreme court of North Carolina may be declared nu'l and void and of no effect.

CHARLES F. WARREN,
G. W. S. MUSGROVE,
Attorneys for Isaac H. Harris.

4 [Endorsed:] In the supreme court of North Carolina. B. Balk *vs.* Isaac H. Harris. Petition for writ of error and

assignment of errors. Mr. Clerk:—Please file Chas. F. Warren G. W. S. Musgrave att'ys for Harris. Filed in supreme court of N. C. May 26, 1903.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of North Carolina, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between B. Balk, plaintiff, and Isaac H. Harris, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty,
6 or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Isaac H. Harris as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of January, in the year of our Lord one thousand nine hundred and four.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT,
Clerk of the Circuit Court of the United States.

Allowed by
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

Filed January 14, 1904.

7 UNITED STATES OF AMERICA, ss:

To B. Balk, Esq., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of North Carolina, wherein Isaac H. Harris is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, chief justice of the supreme court of North Carolina, this 28th day of January, in the year of our Lord one thousand nine hundred and four.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

(Endorsed:) We hereby acknowledge and accept service of the within, waiving service of the same by sheriff or U. S. marshal, but without prejudice to us upon them erits of the appeal. Small & MacLean, attorneys for B. Balk. January 28, 1904.

8 [Endorsed:] We hereby acknowledge and accept service of the within, waiving service of the same by sheriff or U. S. marshal Jan'y 28th, 1904, but without prejudice to us upon the merits of the appeal. Small & MacLean, attorneys for B. Balk.

9 Know all men by these presents, that we, Jacob Epstein, as principal and The United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto B. Balk in the full and just sum of six hundred dollars to be paid to the said B. Balk, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 9th day of January in the year of our Lord one thousand nine hundred and four. Whereas, lately at a session of the supreme court of the State of North Carolina in a suit depending in said court between B. Balk and Isaac H. Harris, a judgment was rendered against the said Isaac H. Harris, and the said Isaac H. Harris having obtained a writ of error and filled a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said B. Balk citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof; now, the condition of the above obligation is such, that if the said Isaac H. Harris shall prosecute said writ of error to effect, and answer all damages and costs if

he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JACOB EPSTEIN. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY. [SEAL.]
CHAS. J. PENNIMAN, [SEAL.]
2nd Vice-President.
ALBERT H. BUCK,
4th Assistant Sec.

Sealed and delivered in presence of
A. S. ROSENAUR,
BENJ. T. HYSON.

Approved by
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

10 STATE OF NORTH CAROLINA, }
Beaufort County. }

Be it remembered that at a justice's court begun and held for and in Beaufort county and Washington township N. C. on the 11th. day of August, 1896 before his worshipful, E. S. Simmons, justice of the peace of Beaufort county, N. C., B. Balk appeared and sued out a writ in manner and form following, to-wit:

Beaufort County Justice's Court, Washington Township.

B. BALK }
v.
ISAAC H. HARRIS. }

Before E. S. Simmons, J. P.

State of North Carolina to any constable or other lawful officer of Beaufort county, Greeting:

You are hereby commanded to summon Isaac H. Harris to appear before me at my office in Washington township county of Beaufort on the 13th. day of August 1896 at 10 o'clock a. m. to answer to the complaint of B. Balk for non-payment of the sum of one hundred and eighty dollars and — cents due by account and demanded by said plaintiff. Herein fail not and of this summons make due return. This 11th. day of August 1896.

E. S. SIMMONS,
Justice of the Peace.

Summons served August 11, 1896 by reading the within summons to Isaac H. Harris.

R. T. HODGES, *Sheriff.*

(Title of Cause.)

Isaac H. Harris being duly sworn says that he is unable to obtain justice before E. S. Simmons, J. P. who issued the summons in this cause, and he prays that the said action be removed before some other justice of the peace as is allowed by section 907 of the Code.

ISAAC H. HARRIS.

Sworn to and subscribed before me this the 14th. day of August, 1896.

W. H. POTTS, *J. P.*

11 *Order of Removal.*

(Title of Cause.)

For the causes set forth in the foregoing affidavit this action is removed before Thomas H. Blount, Esq. justice of the peace for Washington township to be heard by him in the court house in Washington N. C. at 11 o'clock a. m. August 19, 1896. This the 17th. day of August 1896.

E. S. SIMMONS, *J. P.*

Complaint.

(Title of Cause.)

Before T. H. Blount, J. P.

The plaintiff complains of the defendant and alleges that the defendant is indebted to him for money loaned at sundry times during July and August 1896 in the sum of one hundred and eighty dollars; that no part of the same has been paid, but all thereof is still due and unpaid, and defendant admits same.

Wherefore, plaintiff demands judgment in the sum of one hundred and eighty dollars, with interest from August 1st, 1896, and for costs.

J. H. SMALL,
Attorney for Plaintiff.

Answer.

(Title of Cause.)

Before Thos. H. Blount, J. P.

The defendant Isaac H. Harris, answering the complaint herein, says:

1. That he admits that he was indebted to the plaintiff B. Balk in the sum of one hundred and eighty dollars, for money borrowed by him from the said Balk.

2. That on the 6th day of August, A. D. 1896, an action was duly instituted by Jacob Epstein (trading as Baltimore Bargain House) against B. Balk, in the superior court of Baltimore city, in the 8th judicial circuit of the State of Maryland, and of which action the said court had jurisdiction, and in which said action, upon the said day, an attachment was issued, and was duly served upon the defendant in this action, the said Isaac H. Harris, as garnishee, whereby the said defendant was commanded to appear before the said court on a day named in said writ of attachment (to-wit, on the second Monday in August), and show cause, if any, why the lands, tenements, goods, chattels and credits attached should not be condemned and execution thereof had and made to and for the use of Jacob Epstein, trading as aforesaid. That this defendant appeared in said cause, so pending, and admitted under oath his indebtedness to the said B. Balk in the sum of one hundred and eighty dollars, as aforesaid; and that thereupon a judgment was entered against the said Harris, as garnishee, for the sum of one hundred and eighty, dollars in favor of Jacob Epstein, trading as aforesaid, and condemning the said amount. That execution duly issued thereon against this defendant. That this defendant has
12 duly paid the said sum of one hundred and eighty dollars to Jacob Epstein, trading as aforesaid. That the judgment against this defendant in the said action, and the issuing of execution thereon, and the payment of the said sum to Jacob Epstein, trading as aforesaid, is a full and complete bar and defense by the defendant to this action, now prosecuted by the said Balk, and this defendant pleads the same in defense of and as a bar to this action.

Wherefore, defendant prays that he go without day, and recover his costs, and that the action be dismissed.

CHAS. F. WARREN,
Attorney for Defendant.

Reply.

The plaintiff replying to the answer of the defendant, says:

I. That he denies section 2 of the answer. He denies that any valid action was instituted in the courts of Maryland against this plaintiff by Jacob Epstein, or that any valid or legal service of process therein was made on this plaintiff, or that the alleged attachment pretended to have been issued thereon was valid. He further denies that the courts of Maryland as alleged, has jurisdiction in said action, or any action against this plaintiff. He denies that any property of this plaintiff, subject to attachment, was or has been or is in the State of Maryland, or was so existing at the time the alleged action was instituted in the courts of Maryland. He denies that any execution issued against Isaac H. Harris in the alleged action instituted in the court of Maryland. He denies that Isaac H. Harris, defendant herein has paid to Jocob Epstein the sum of $180, or any sum, as alleged, or that he was required to do so. He denies that

the allegation in section 2 of the answer constitutes a bar or defense by the defendant in this action.

II. Referring further to the allegations in section 2 of the answer, this plaintiff avers that Isaac H. Harris, defendant herein, made no defense and entered no proper plea therein, and did not contest the same.

13 III. That this plaintiff owns no real estate in North Carolina or elsewhere; that he does not own personal property of the value of five hundred dollars, or in excess of his personal property exemptions. That the personal property exemption of this plaintiff was set apart to him, as required by law, shortly prior to the institution of this action, and a part of his said exemptions consisted of goods and merchandise, which he subsequently sold; and the said sum of $180, loaned by the plaintiff to the defendant, was in part the proceeds of sales of the personal property exemption allotted to this plaintiff. That against any alleged debt of this plaintiff to Jacob Epstein, the plaintiff is entitled to have his personal property exemption allotted to him as a resident of North Carolina, as provided by law.

JOHN H. SMALL,
Attorney for Plaintiff.

STATE OF NORTH CAROLINA, }
Beaufort County. }

Before T. H. Blount, justice of the peace.

B. BALK }
v. } Return to Notice of Appeal.
ISAAC H. HARRIS. }

To the superior court of Beaufort county:

An appeal having been taken by the defendant I. H. Harris, I Thos. H. Blount, the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the 11th day of August, 1896, at the request of the plaintiff, E. S. Simmons issued a summons in his favor (and set the case to be heard before me) and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office, and at the same time and place the parties personally appeared.

The plaintiff complained for non payment of one hundred and eighty dollars, loaned defendant from time to time.

14 The defendant denied the indebtedness, on the ground that by attachment under the laws of Maryland judgment had been had against him; and he claims that he had paid said judgment, and having done so he was thereby relieved of payment to plaintiff.

Both parties introduced evidence upon the claims as made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the 2d day of September, 1896, for $180, with interest on $180 from 11th day of August, 1896, and for $1.30 cost paid by plaintiff.

I also certify that on the 2d day of September, 1896, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of 30 cents for making my return, all of which I send, together with process, pleadings, and other papers in the case, including a bond for $180 and costs.

Dated this 7th day of September, 1896.

THOS. H. BLOUNT,
Justice of the Peace.

Bond on Appeal to Superior Court.

(Title of Cause.)

Before Thos. H. Blount, J. P.

Whereas judgment was rendered this day in the above entitled cause in favor of the plaintiff, B. Balk, and against the defendant, Isaac H. Harris, by Thos. H. Blount, a justice of the peace before whom the same was tried, for the sum of one hundred and eighty dollars with interest thereon from date of summons in this cause, and also for the costs; and whereas the defendant Isaac H. Harris has appealed from the said judgment to the superior court of Beaufort county: Now therefore we Isaac H. Harris, principal and L. B. Luskins, surety, do undertake and agree if judgment shall be rendered against the appellant, to pay the amount, together with all cost awarded against the said appellant in favor of the said plaintiff.

Witness our hands and seals this the fourth day of September, 1896.

ISAAC H. HARRIS. [SEAL.]
L. B. LUSKINS. [SEAL.]

This bond is approved September 4, 1896.

THOS. H. BLOUNT, *J. P.*

Issue.

Is defendant indebted unto plaintiff, and if so how much?
Answer. Nothing.

STATE OF MARYLAND, }
City of Baltimore. }

At a session of the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, begun and held at the court

house in the city of Baltimore, in and for the city aforesaid, on the second Monday of May, (being the eleventh day of the same month) in the year of our Lord one thousand eight hundred and ninety-six: Present, the Honorable Albert Ritchie, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city.

STEPHEN R. MASON, *Sheriff.*
ROBERT OGLE, *Clerk.*

15 Among others were the following proceedings, to-wit:

JACOB EPSTEIN, Trading as Baltimore Bargain House,
v.
B. BALK.

Be it remembered that heretofore, to-wit, on the sixth day of August, A. D., 1896, Jacob Epstein, the plaintiff in this action, appeared before the clerk of the superior court of Baltimore city and made affidavit for an attachment against a non-resident, debtor under and in pursuance of the statute in such case made and provided; and at the time of making said affidavit produced and filed the open account by which the said B. Balk is so indebted, which said affidavit and open account are in the words, figures and tenor following, to-wit:

Be it remembered, and it is hereby certified, that on this 6th day of August, in the year eighteen hundred and ninety-six personally appeared before the subscriber, clerk of the superior court of Baltimore city, Jacob Epstein, and made oath on the five books of Moses (he being an Israelite), that B. Balk, not being a citizen of the State of Maryland, and not residing therein, is justly and *bona fide* indebted to him, the said Jacob Epstein, trading as Baltimore Bargain House, in the full and just sum of three hundred and forty-four dollars and twenty-four cents ($344.24), over and above all discounts; and at the same time the said Jacob Epstein produced to me the open accounts on and by which the said B. Balk is so indebted, which are hereunto annexed. And the said Jacob Epstein did make oath that he, the plaintiff, is credibly informed, and verily believes, that the said B. Balk is not a citizen of the State of Maryland and does not reside therein.

ROBERT OGLE,
Clerk of the Superior Court of Baltimore City.

(Statement of account set out in this record is the same as that hereinafter stated. E. & O. E).

16 And thereupon the said plaintiff, by G. W. S. Musgrove, Esq., his attorney, in pursuance of the statute aforesaid, prosecuted and sued forth out of the said court here, the writ of the State of Maryland of attachment to the sheriff of Baltimore city, directed as follows, to wit:

State of Maryland to the sheriff of Baltimore city, Greeting:

Whereas, Jacob Epstein has appeared before the clerk of the superior court of Baltimore city, and produced and filed in court the open account as an evidence of indebtedness, and at the same time also made oath in due form of law that a certain B. Balk is justly and *bona fide* indebted to him, the said Jacob Epstein, trading as Baltimore Bargain House, in the sum of three hundred and forty-four dollars and twenty-four cents ($344.24) over and above all discount, and that the said Jacob Epstein, the plaintiff, is credibly informed, and verely believes, that the said B. Balk is not a citizen of the State of Maryland and does not reside therein.

We therefore command you, that you attach the lands, tenements, goods, chattels and credits of the said B. Balk, to the value of three hundred and forty-four dollars and twenty-four cents, current money, and costs of this attachment, according to the form of the Code of Public General Laws in such cases made and provided. And we further command you, that you make known unto the person or persons in whose hands you shall lay this attachment that he, she or they be and appear before the judge of the superior court of Baltimore city, at the court house in the same city, on the second Monday of August, instant, to show cause (if any he, she or they have) why the lands, tenements, goods, chattels and credits, by you attached by virtue of this writ, in his, her or their hands shall not be condemned and execution thereof had and made to and for the use of the said Jacob Epstein, trading as aforesaid, as of the lands, tenements, goods, chattels, and credits of the aforesaid B. Balk, ac-
17 cording to the Code of Public General Laws, in such cases made and provided, if to him, her or them it shall seem meet; and how you shall execute this writ make known to the judge of the superior court of Baltimore city at the day and place aforesaid, and have you then and there this writ.

Witness, the Honorable Henry D. Harlan, chief judge of the supreme bench of Baltimore city, the 11th day of May, in the year of our Lord eighteen hundred and ninety-six.

Issued 6th day of August, 1896.

ROBERT OGLE,
Clerk of the Supreme Court of Baltimore City.

And the said plaintiff, by his attorney aforesaid, at the same time prosecuted and sued forth the writ of the State of Maryland of summons directed to the sheriff of Baltimore city aforesaid, as follows, to wit:

State of Maryland to the sheriff of Baltimore city, Greeting:

You are hereby commanded to summon B. Balk to appear before the superior court of Baltimore city, to be held at the court house in the same city, on the second Monday of August, instant, to answer an action at the suit of Jacob Epstein, trading as Baltimore Bargain House, and have you then and there this writ.

Witness, the Honorable Henry D. Harlan, chief judge of the supreme bench of Baltimore city, the 11th day of May, 1896.
Issued 6th day of August, 1896.

ROBERT OGLE, *Clerk.*

And thereupon the said plaintiff, by his attorney aforesaid, files in court here the following short note, to-wit:

18 JACOB EPSTEIN, Trading as Baltimore Bargain House,
v.
B. BALK.

Action in the superior court of Baltimore city, May term, 1896.

This suit is instituted to recover the sum of three hundred and forty-four dollars and twenty-four cents, due and owing from defendant to the plaintiff, for money payable by the defendant to the plaintiff.

1. For goods bargained and sold by the plaintiff to the defendant
2. And for work done and materials provided by the plaintiff for the defendant, at his request.
3. And for money lent by the plaintiff to the defendant.
4. And for money paid by the plaintiff for the defendant, at his request.
5. And for money received by the defendant for the use of the plaintiff.
6. And for money found to be due from the defendant to the plaintiff on accounts stated between them.

G. W. S. MUSGROVE,
Attorney for Plainiff.

A copy of which said short note was made out and sent, with the writs aforesaid, to the sheriff of Baltimore city aforesaid, thereon endorsed, to-wit: "Copy of short note within to be set up at the court house door."

At which said second Monday of August, to-wit, in the year A. D. one thousand eight hundred and ninety-six, being the return day of the foregoing writs, came into our said court here the said plaintiff, by his attorney aforesaid, and the sheriff of Baltimore city, to-wit, Stephen R. Mason, gentleman, and makes return of the said writ of attachment to the court here, thus endorsed, to-wit:

"Laid in the hands of Isaac H. Harris, on the 6th day of August, 1896, at 4.07 o'clock p. m. in the presence of Charles N. Whittle, and garnishee summoned.

"STEPHEN R. MASON, *Sheriff.*"

19 And at the same time the said sheriff, to whom the said writ of summons was directed and the copy of the short note was sent, makes return of the said writ of suuumons to the court here,

thus endorsed, to-wit: "*Non est.* Copy of short note set up at the court house door.

"STEPHEN R. MASON, *Sheriff.*"

And the said defendant B. Balk, being called, does not come.

And the said Isaac H. Harris, garnishee, in whose hands of possession the goods, chattels, lands, tenements and credits of the said defendant were so as aforesaid attached, being also called, came into our said court here, by W. N. Ewing his attorney, and files the following confession of assets, to-wit:

In the Superior Court.

JACOB EPSTEIN, Trading as Baltimore Bargain House,
vs.
B. BALK; ISAAC H. HARRIS, Garnishee.

And the said Isaac H. Harris, the garnishee in the above case, by W. N. Ewing his attorney, confesses that there is justly due and owing by him to the defendant the sum of one hundred and eighty dollars ($180), as per the annexed account; and he further says that, besides the said sum of $180, he had not at the time of paying the said attachment in his hands, nor at any time since has he had, nor has he now, any other of the goods, chattels, tenements or credits of the said B. Balk, and this he is ready to verify.

W. N. EWING,
Attorney for Garnishee.

STATE OF NORTH CAROLINA,
Beaufort County.

I. H. Harris, being by me duly sworn, makes oath and deposes: That he has in his possession, as the property of B. Balk, one hundred and eighty dollars ($180), and the amount has been attached by Jacob Epstein, of Baltimore, Md.

I. H. HARRIS.

20 Sworn and subscribed before me, this 11th day of August, 1896.

THOS. J. LATHAM,
[NOTORIAL SEAL.] *Notary Public.*

And thereupon the following order of counsel and order of court were filed in said cause, to-wit:

Mr. Clerk: Please enter an order of condemnation against the garnishee for $180, the amount confessed.

G. W. S. MUSGROVE,
For Plaintiff.
W. N. EWING,
For Garnishee.

Let judgment be entered as prayed, for $180.

HENRY D. HARLAN.

MEMORANDUM.—Judgment of condemnation against the garnishee was entered in favor of the plaintiff for $180, the amount confessed, in the hands of the garnishee.

20a STATE OF MARYLAND, }
City of Baltimore. }

I, Robert Ogle, clerk of the superior court of Baltimore city do hereby certify that the foregoing is a full, true and entire transcript taken from the record and proceedings of the said court in the therein entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of the superior court of Baltimore city aforesaid on the 26th. day of August 1896.

ROBERT OGLE,
Clerk Superior Court of Baltimore City.

MARYLAND:

I, Chas. E. Phelps, associate justice of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city in the eighth judicial circuit of said State, do certify that the foregoing attestation of Robert Ogle, clerk of the said superior court of Baltimore city is in due form and by the proper officer.

Given under my hand at the city of Baltimore, this 28th. day of August, 1896.

CHAS. E. PHELPS.

STATE OF MARYLAND, }
Baltimore City. }

I Robert Ogle, clerk of the superior court of Baltimore city, do hereby certify that the Honorable Charles E. Phelps who has certified and signed the above attestation was, at the time of so doing, presiding judge of the superior court of Baltimore city in the eighth judicial district of the State of Maryland, duly commissioned and qualified; and that to all acts done by him in that capacity, full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof I hereunto subscribe my name and affix the seal of the superior court of Baltimore city on this 28 day of August 1896.

ROBERT OGLE,
Clerk Superior Court of Baltimore City.

(Title of Cause.)

North Carolina, Beaufort County, Superior Court, Fall Term, 1896

This cause coming on to be heard at fall term, 1896 of Beaufort county before his honor E. W. Timberlake, judge presiding, and the following named jurors, to-wit (names not given in the record) being duly sworn and empaneled to try the issues arising upon the pleadings and appearing upon the minutes of this court, and having found said issues in favor of the defendant: It is now upon motion of Charles F. Warren, attorney of defendant ordered, adjudged and decreed that the defendant Isaac H. Harris is not indebted to the plaintiff B. Balk in any sum whatever, and that the said defendant recover of the said plaintiff the cost of action to be taxed by the clerk.

E. W. TIMBERLAKE,
Judge Presiding.

20*b* (Title of Cause.)

B. Balk, the plaintiff in the above entitled action being duly sworn deposes and says that at the above term of the superior court of Beaufort county a judgment was rendered in the above entitled action against affiant and that he desires to appeal therefrom to the Supreme Court; that he is unable by reason of his poverty to give the surety required by law for the said appeal, and that he is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action: wherefore he prays that he may be allowed to appeal from the said judgment to the Supreme Court, as in other cases of appeal, without giving security therefor.

B. BALK.

Sworn and subscribed to before me this 18th. day of December, 1896.

GEO. W. GUILFORD,
Clerk Superior Court.

John H. Small hereby certifies to the court as follows: That he is a practicing attorney in the courts of North Carolina, that he has examined the case of affiant, B. Balk, and that he is of opinion that the decision of the superior court in said action is contrary to law.
This 8th. day of December, 1896.

JOHN H. SMALL, *Attorney.*

Upon hearing the foregoing affidavit of B. Balk and of the written statement of John H. Small, an attorney of the superior court, it is hereby adjudged that the plaintiff B. Balk be allowed to appeal from the judgment of the superior court in the above entitled action

to the Supreme Court, as in other cases of appeal, without giving security therefor.

This 9th. day of December, 1896.

GEO. W. GUILFORD,
Clerk Superior Court.

Case on Appeal.

This was a civil action, tried before his honor, E. W. Timberlake, judge presiding, and a jury. The action was originally begun before E. S. Simmons, a justice of the peace, and removed upon affidavit before T. H. Blount, justice of the peace, who rendered judgment for plaintiff, and defendant appealed to the superior court, and gave bond to stay execution. The summons, affidavit for removal, return of justice of the peace to notice of appeal, and bond to stay execution are herewith sent. The complaint, answer and replication show the contention of the parties, and are made a part of this case.

Upon the trial the following testimony was introduced:

It was admitted that the claim of Jacob Epstein, trading as Baltimore Bargain House, was received by C. F. Warren, attorney, for collection May 1st, 1896, from the Protective Credit and Col-
21 lection Bureau of Baltimore, Md., whose manager is W. H. H. Raleigh. Further, that prior to visit of defendant Harris to Baltimore, in August, 1896, C. F. Warren, attorney, had written the collection agency that Harris was indebted to Balk in the sum of $180, and had received a letter acknowledging receipt of such letter, and that Warren did not derive this information from defendant Harris

The defendant Harris then introduced the following evidence:

The defendant offered the transcript of the record of the cause in the superior court of Baltimore city, eighth judicial circuit of the State of Maryland, entitled, Jacob Epstein, trading as Baltimore Bargain House, against B. Balk, and the garnishment therein of defendant Harris. The plaintiff Balk objected because (1) it did not appear therefrom that there was any valid service of process therein upon B. Balk, either actual or constructive, and that the pretended attachment issued therein was not valid, because the affidavit for same did not show sufficient facts upon which attachment could issue, or to give the court jurisdiction, and for other reasons was invalid; (2) because it appears on the face thereof that said B. Balk was not a resident of Maryland, and it does not appear that Balk had any property in Maryland subject to attachment; (3) because it does not appear therefrom that said Harris was legally required to pay any money to said Epstein.

(Objection overruled. Exception by plaintiff.)

ISAAC H. HARRIS testified: I am the defendant in this action. I owed Balk $180 *dollars*, and it was the same debt levied on in Baltimore. I did not communicate in any way to Jacob Epstein that I owed Balk $180. After the garnishment I paid the money to C. F. Warren, attorney for Epstein after my return from Baltimore in August, 1896.

22 Cross-examination:

I live in Washington, North Carolina. The plaintiff B. Balk lives here also, and this is his home. Jacob Epstein lives in Baltimore, Md. I borrowed the money from Balk here in the town of Washington, N. C., on several occasions, and there was no agreement of the place of payment. I expected to pay Balk here, as he lived here. I went to Baltimore 1st August to buy goods, and was there two or three days, and came back here. I expected to return earlier than I did when I left here. I gave no note or written obligation of any kind to the plaintiff B. Balk for the $180 I borrowed from him. I borrowed the money from plaintiff at different times. The last $10 I borrowed from plaintiff just before I left for Baltimore. I did not take any of the identical money I borrowed from Balk along with me to Baltimore, nor did I have one cent of the particular money I borrowed from Balk while I was in Baltimore, and when the notice was served on me. I had about $5 when the attachment was served. I left Baltimore next day for North Carolina after the notice of attachment was served, and I gave no bond to return or to pay the money. I employed no lawyer in Baltimore. I did not go back to Baltimore and fight the attachment, and have not been there since. I did not tell them in Baltimore that I owed Balk anything. I did not make affidavit in this town (after my return here) that I owed plaintiff Balk. After my return to North Carolina I paid C. F. Warren, attorney for Epstein, and had no understanding that he was to hold the money. I paid him as soon as I found they had taken judgment against me in Baltimore, because they would not ship my goods; and I paid it to prevent my goods being seized. I never told anybody here before I went to Baltimore that I owed Balk $180. Balk told me before I left here that if Epstein would give him a clear receipt for his old debt, he would go to Baltimore and buy $500 or $600 worth of goods and pay cash, and this was why I sent a telegram. Epstein knew nothing about the
23 telegram. Nothing was said about the place of payment when I borrowed the money. As I was leaving for Baltimore, I promised plaintiff to pay him upon my return.

The defendant offered vol. I of the Public General Laws of the State of Maryland, adopted by the General Assembly of Maryland March 14th, 1888, and purporting to have been published by authority of the State of Maryland; that part of the said book was offered relating to attachments, being art. IX. The said article was a printed copy of the laws of Maryland relating to attachments.

(Objection by plaintiff. Objection overruled. Exception by plaintiff.)

The defendant rested.

The plaintiff introduced evidence. The Plaintiff, B. BALK, testified as follows. My home is here in Washington, North Carolina. The sum of $180 I lent defendant Harris was part of my $500 personal property exemptions. I owned no land in North Carolina or elsewhere. I do not own $500 worth of personal property anywhere, including this $180.

As defendant Harris was going off to Baltimore, I told him to tell Jacob Epstein I would be in Baltimore soon, and Harris promised to pay me back my $180 as soon as he returned from Baltimore. My personal property exemptions were set apart under an execution, in favor of the Norfolk Pants Company, in December, 1895. This $180 I loaned defendant Harris was the proceeds of sale of a part of my personal property exemptions allotted to me.

Cross-examination:

I owe Jacob Epstein about $344. I did not wish him to make me a present of the debt.

The plaintiff offered in evidence judgment roll in Norfolk Pants Company against B. Balk, and also the execution issuing thereon. The execution with the return thereon, showing that the personal property exemption of B. Balk was set apart, is herewith sent and made a part hereof.

No further evidence was offered by either party.

24 The plaintiff requested the court to charge the jury that they should answer the issue in favor of the plaintiff. After argument before the court, the court directed that a verdict be entered in favor of the defendant, and the jury answered the issue accordingly, which issue is herewith sent.

The plaintiff moved for a new trial and assigned as grounds of error:

(1.) That the court erred in admitting in evidence the transcript of the record of the cause in the superior court of Baltimore city, entitled Jacob Epstein against B. Balk.

(2.) Because the court erred in admitting the volume of laws purporting to be the public laws of the State of Maryland.

(3.) Because the court erred with reference to the record in Epstein against Balk, in holding that there had been constructive or legal service therein upon said B. Balk, and because the court held that the affidavit upon which the alleged writ of attachment therein was issued was sufficient to give the court jurisdiction or to authorize the writ of attachment.

(4.) Because the court erred in holding that the plaintiff Balk was not entitled to have this debt of $180 owing him by defendant

allotted to him as his personal property exemption as against the alleged debt of Jacob Epstein.

(5.) Because the court erred in holding that the said record in Jacob Epstein against B. Balk was a bar to this action by the plaintiff, Balk against the defendant Harris.

(Motion denied. Exception by plaintiff.)

The plaintiff gave notice of appeal to the supreme court. Notice waived. Bond in the sum of twenty-five dollars adjudged sufficient.

The foregoing is settled at New Berne, on February 4th, 1897, after notice, as case on appeal, and clerk will certify same to supreme court as case on appeal.

E. W. TIMBERLAKE,
Judge Presiding.

25 STATE OF NORTH CAROLINA, }
Beaufort County. }

I, Geo. W. Guilford, clerk of the superior court of Beaufort county, N. C., hereby certify that the foregoing is a full, true and perfect transcript of the record and papers in the above stated case.

Witness my hand and official seal this September 7, 1897.

[L. S.] GEO. W. GUILFORD,
Clerk Superior Court.

(Docket entries:) Appeal docketed Sept. 25, 1897—Continued till next term. Argued Feb. 11, 1898. Opinion handed down May 4, 1898, as follows:

26 North Carolina Supreme Court, February Term, 1898.

B. BALK }
vs.
ISAAC H. HARRIS. }

CLARK, *J.*:

The plaintiff and defendant resided in North Carolina, and the latter was indebted to the former in the sum of $180 for borrowed money, presumptively payable here. Harris while on a visit to Baltimore was served with notice of garnishment by Jacob Epstein in a proceeding instituted by said Epstein against Balk in the superior court of Baltimore city. No service of the summons was made upon Balk, Harris testifies that he gave no bond to appear or pay the money, and employed no lawyer, though the record shows that counsel assuming to appear for him, joined Epstein's counsel in asking that judgment be entered up. After his return home, hearing that judgment had been taken against him in Baltimore, no execution being issued, he paid the $180 to Epstein's lawyer here to be remitted to Baltimore.

In this action, the plaintiff excepted on the ground that, (1) the court in Baltimore not having acquired jurisdiction against him by service of process or attachment of property, the garnishment against Harris was a nullity. (2) That Harris having paid voluntarily, and not under compulsion was not discharged from his liability to the plaintiff. (3) That the money loaned defendant was proceeds of sale of his personal property exemptions. (4) That the court here erred in admitting as evidence the printed volume purportiug to be the public general laws of Maryland and to be published by authority of the said State.

The last exception cannot be sustained, for the Code, sec. 1338, makes such book, purporting to be published by the authority of another State, evidence of its statute law. Copeland *v.* Collins, at this term.

The third exception has no force, for our exemption laws can have no extra territorial force. Railroad *v.* Maggard, 6 Colo. 85; Story Con. Law, sec. 539. They are merely exemptions from execution issued by the courts of this State, and by virtue of congressional enactment are also protected as to executions issued by the United States court in this State.

But, as to the first two exceptions: in the proceedings instituted by Epstein in the superior court of Baltimore against Balk
27 the latter could only be brought into court by a service of process personally, or by attachment of his property in that State. Pennoyer *v.* Neff, 95 U. S., 714; Bernhardt *v.* Brown, 118 N. C., 700; Long *v.* Insurance Company, 114 N. C., 465; and it must appear affirmatively by affidavit, as the basis of such proceeding, when the defendant is a non-resident, that he has property in said State. Wilson *v.* Seligman, 144 U. S., 41; Baker *v.* Johnson, 110 N. C., 114. An examination of the certified transcript from the superior court of Baltimore shows that Epstein's affidavit does not aver that Balk had any property of any description in Maryland, but merely that he was a non-resident of said State. The Maryland court, therefore, acquired no jurisdiction upon which an order affect-Balk could be issued, and, this being a jurisdictional defect, the judgment of the Maryland court can be col-atterally attached in this proceeding. Pennoyer *v.* Neff, *supra;* Springer *v.* Shavender, 118 N. C., 33.

Furthermore, the payment by Harris was not made under compulsion, but voluntarily, by paying the amount to Epstein's lawyer in North Carolina after his return to this State. Such payment by a garnishee cannot protect him against the claim of his creditor. Drake on Attachment (5th edition) section 711 (3).

It is true Harris says that he feared that the judgment in Maryland would prevent his goods being shipped to him, but he did not show that he had any goods, nor that any execution issued, nor that they were levied on. He, himself, was under no bond or obligation to appear at court in Baltimore or to pay the judgment. His vol-

untary payment, remitted to Epstein, will not discharge his legal liability to the plaintiff to pay the money he borrowed of him.

The plaintiff further raised the point that the situs of the debt being with the creditor in North Carolina where both Balk and Harris resided, and where the debt was payable, Balk had no property in Maryland liable to attachment by reason of the mere fact that his debtor (Harris) was transiently in that city. This is a very interesting question, and there is a great weight of authority to sustain that view, but not without some decisions looking the other way, many of which, on both sides, are collected in the notes to Illinois Central Railroad Co. *v.* Smith, 19 L. R. A. 577. It is unnecessary, however, in this case, that we discuss it. Error.

28 (Title of Cause.)

Judgment, February Term, 1898.

This cause came on to be argued upon the transcript of the record from the superior court of Beaufort county:—upon consideration whereof, this court is of opinion that there is error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Walter Clark justice, be certified to the said superior court, to the intent that proceedings be had therein as indicated in said opinion.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred, to wit, the sum of eighteen 40 / 100 dollars ($18.40), and execution issue therefor.

[Seal Supreme Court of the State of North Carolina.]

—— ——.

29 Petition of defendant to rehear docketed Nov. 9, 1898 as follows:

B. BALK
v.
ISAAC H. HARRIS. } No. —. From Beaufort.

To the honorable the supreme court of the State of North Carolina:

The defendant Isaac H. Harris respectfully asks the court to grant a rehearing upon the following grounds, to-wit:

1. That the court erred in holding that it should appear *affirmatively* in the affidavit in the record of Jacob Epstein, trading as Baltimore bargain house, against B. Balk and Isaac H. Harris—garnishee, being a judgment of the superior court of Baltimore city State of Maryland, *that the defendant B. Balk had property in the said State.* The defendant in this action, now pending in the courts of North Carolina, and pleading the judgment of the Maryland court in defense and bar, insists that the judgment of the State of Mary-

land and all proceedings prior to the said judgment, were in strict conformity to the laws of the State of Maryland relating to attachment and garnishment, and that the said laws do not require any statement in the affidavit that the defendant Balk had property in said State; that the judgment rendered in the State of Maryland, the defendant insists, is a valid judgment of that State, and is entitled, when properly pleaded and proved in the courts of North Carolina, to full faith and credit, and is a bar and defence to this action.

2. That it does appear in the record of the Maryland judgment, although not in the affidavit of the plaintiff Jacob Epstein,
30 that defendant Balk had property in the State of Maryland, Harris, the debtor of Balk, having been served in that State and confessing the debt; that the defendant in this cause insists that it sufficiently appears from the Maryland record that Balk had property in that State and brought under the control of its courts.

3. If the judgment of the Maryland court be a valid judgment of that State and entitled to full faith and credit here, then the defendant insists that the payment, under the circumstances of the case, made by him of his debt to Epstein, the creditor of Balk, was a discharge from the debt due by defendant to Balk, and that the court erred in deciding that such payment did not discharge the defendant.

4. The court does not hold that the debt due by defendant Harris to Balk, the defendant Harris being personally served by process in the State of Maryland, was not property in the jurisdiction of and under the control of the Maryland court. In the opinion of the court, the *situs* of the debt is left an open question. The defendant insists that for the purpose of attachment and garnishment in this case, the *situs* was in Maryland, where the defendant Harris, the debtor of Balk, was found and served. That this petition for rehearing is filed by the defendant in good faith and not for the mere purpose of delay; that this petition is filed by the advice of defendant's counsel, and the defendant earnestly insists that by the decision of the court that the Maryland judgment was invalid and the payment made by defendant was unauthorized, the court committed an error and the defendant will be required to pay the same debt twice. That defendant feels assured that the court, if any error has been committed, will correct the same.

That the defendant Isaac H. Harris, upon the appeal of this case from the justice of the peace who tried the same to the superior court of Beaufort county, gave an undertaking to pay the alleged debt of the plaintiff B. Balk, and the costs of the action. That the said undertaking was then, and is now, a perfectly solvent bond, and any recovery which the plaintiff may obtain is entirely secured
31 and protected by the said bond. That the defendant has also filed with the clerk of the supreme court a bond sufficient in

amount and solvent, to cover the judgment rendered by the supreme court herein, and the said judgment is secured by the said bond.

CHAS. F. WARREN,
Attorney for Defendant, Isaac H. Harris.

Certificate of Counsel.

We, John W. Hinsdale and W. J. Peele, members of the bar of the supreme court of North Carolina, do hereby certify that we have no interest in the subject matter of the action of B. Balk against Isaac H. Harris, decided at the February term, 1898, of the said court, and have never been of counsel for either party to the said action. We further certify that we have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion of the court, and that in our opinion, with deference to the court, the decision is erroneous in the several particulars stated in the foregoing petition for a rehearing.

JOHN W. HINSDALE,
W. J. PEELE,
Attorneys-at-law.

(Endorsed:) I think this case ought to be reheard. Nov. 9, 1898
Walter A. Montgomery asso. justice, supreme court

Argued Feb. 9, 1899. Opinion handed down Apr. 18, 1899 as follows:

32 February Term, 1899.

B. BALK
v.
ISAAC H. HARRIS.

CLARK, *J.*:

This is a petition to rehear the decision reported in 122 N. C., 64. The judgment of another State condemning the debt due by Harris to Balk can only be recognized as valid here when the court acquired jurisdiction. It was not founded on personal service, but it is contended that the Maryland court acquired jurisdiction by attaching the debt due Balk by serving notice upon Harris, who was transiently in the city of Baltimore. The situs of the debt for purposes of taxation, and usually for all purposes, is with the creditor. But there are many States whose courts hold that for the purposes of attachment the situs of the debt is at the residence or domicile of the debtor. The conflicting authorities are summed up and arrayed in the notes to Railroad *v.* Smith, 19 L. R. A., 577, whose accomplished editor sums up a careful review of the authority as follows: "The true doctrine seems to us to be that no jurisdiction can be obtained to condemn a debt to a non-resident unless jurisdiction of

his person is obtained, that is, that the situs of the debt for the purpose of garnishment is at the residence of the creditor. To hold that such situs is with the debtor seems against reason because he has no property in the debt and because it allows a proceeding to condemn one's property to be prosecuted without notice to him, or representation by anyone who cares for the protection of his interests. Such a proceeding seems unworthy to be called due process of law." Ghere is logic and force in these views if it were an open question with us, but North Carolina is one of the States whose courts have held that for purposes of an attachment the situs of a debt is where the debtor resides. Cooper *v.* Security Company, 122 N. C., 463; Winfree *v.* Bagley, 102 N. C., 515.

The apparent inconsistency or hardship of such ruling is much lessened by the uniform holding by courts of that line of thought that the attachment of the debt can only be made where the debtor resides, and can have no validity if levied upon him when only passing through or transiently in another State. It is thus stated in 8th Am. and Eng. Enc., 1129, 1130: "Choses in action upon which
33 the garnishee is liable are not to be considered as following the former wherever he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither such debtor nor his creditor resides. As a general rule, therefore, the courts of a State cannot, by their service of process upon an inhabitant of another State transiently within their jurisdiction, charge such person as a garnishee. But if when so served the garnishee have in his possession, within the State, money or property of the defendant, or has contracted to pay money or deliver property within such jurisdiction, he may be charged." This is sustained by uniform decisions (many of which are there stated in the notes) among many others, Smith *v.* Eaton, 36 Me., 298; Lovejoy *v.* Albee, 33 Me., 415; Sawyer *v.* Thompson, 24 N. H., 510; Baxter *v.* Vincent, 6 Vt., 614; Ray *v.* Underwood, 3 Pick, 302; Hart *v.* Anthony, 15 Pick., 445; Cronin *v.* Foster, 13, R. I., 196. In the last case it is said, "When a person transiently in another State is sued for his own debt, it is a different case. But if a person by garnishment is compelled, in order to satisfy a debt not his own, but due from one of his creditors, to pay his own debt in a mode very different from that in which he would otherwise have paid it, it would be a hardship." The court proceeding admits the recognized exceptions above stated that the foreign court could acquire jurisdiction by service upon a garnishee transiently within the State: (1) When the garnishee has personal chattels of the debtor with him (which usually could be attached without garnishment): and (2) when the debt due by the garnishee is contracted to be paid within the State. Among other cases to same effect, Wright *v.* Railroad, 19 Neb., 175, in which it is said (p. 182): "The rule is well settled that garnishment served upon a non-resident of the State, but temporarily within it, is not effectual as an attachment," citing to same purpose Green *v.* Bank, 25 Conn., 451; Casey *v.* Davis, 100 Mass., 124; Sawyer *v.* Thompson,

24 N. H., 510; Lawrence *v.* Smith, 45 N. H., 533; Nye *v.* Liscombe, 21 Pick., 263; Tingley *v.* Bateman 10 Mass., 343; Jones *v.* Winchester, 6 N. H., 497; Matthews *v.* Smith, 13 Neb., 190; Danforth *v.* Penny, 3 Met., 564; Gold *v.* Railroad, 1 Gray, 424. In Bush *v.* Nance, 61 Miss., 237, it is said that unless the debt of the non-resident garnishee was payable in the State where garnishee- "he was not subject to garnishment in that State, and the writ served on him was a nullity, and this seems settled by law of the authorities. The
34 reason is that the court entertaining a garnishment must have some jurisdiction over the thing garnisheed, and where the garnishee is a non-resident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within that State, the jurisdiction is defeated. Such is the well settled law. Drake on Attachments (5th edition) section 474–5, and cases there cited." This is sustained by reference to the citation from Drake on Attachment, and also by Waples on Attachment, 228. There are many other cases to same effect, among them Squair *v.* Shea, 26 Ohio St., 645; Mobile *v.* Barnhill, 91 Tenn., 395; Bank *v.* Railroad, 45 Wis., 172. The defect being jurisdictional, the garnishee cannot waive it "because it is not with him a personal matter, and he has no right to prejudice the defendant. Rindge *v.* Green, 52 Vt., 204; Waples on Attachment, 228; Drank on Attachment, section 476.

Inasmuch as an attachment is in effect a proceeding by the debtor (the defendant in the action) in the name of the plaintiff against the garnishee, it is thus properly held even in those courts which hold that the situs of a debt for this purpose is with the debtor (garnishee) that the action must be brought where he "resides" or "has his domicile," since it is there that his creditor must have sued him. One or two cases unguardedly say the action may be brought "wherever the debtor (garnishee) may be found" but the context and the facts in those cases show that they mean where he may be found "resident" or "domicile" as it is expressly held in all cases where the point is made. As upon the uniform authorities above cited and others not necessary to cite, the Maryland court acquired no jurisdiction as against Balk by service of notice upon his debtor, Harris, who had no tangible property of Balk's in his possession, and was not resident in that State, we reaffirm our former decision, but after the benefit of the able and exhaustive argument upon the rehearing, for an entirely different reason from that given on the first hearing.

Petition dismissed.

35 *Judgment: February Term*, 1899.

(Title of Cause.)

This cause came on to be reargued upon the granting of defendant's petition to rehear this appeal from the superior court of Beau-

fort county:—upon consideration whereof, this court is of opinion that there is no error in the former ruling.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Walter Clark justice, be certified to the said superior court, to the intent that the former ruling is sustained and the petition to rehear is dismissed.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred, to-wit, the sum of twenty-seven 80/100 dollars ($27.80), and execution issue therefor.

[Seal Supreme Court of the State of North Carolina.]

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36 *Record on Defendant's Appeal.*

NORTH CAROLINA,
Beaufort County.

In the Superior Court.

B. BALK
against
ISAAC H. HARRIS.

Know all men by these presents, that we, Isaac H. Harris, principal, and L. B. Suskins, surety, acknowledge ourselves indebted to plaintiff, B. Balk, in the sum of $25, to be void if we shall pay to the said Balk all costs, not exceeding the said sum which may be awarded against the said Isaac H. Harris on an appeal taken by him to the supreme court; otherwise to be in full force and effect.

Witness our hands and seals, this the first day of August, A. D. 1901.

ISAAC. H. HARRIS. [SEAL.]
L. B. SUSKIN. [SEAL.]

STATE OF MARYLAND,
City of Baltimore, } ss:

L. B. Suskin, being duly sworn, says: I am worth the sum of $25 over and above my homestead and personal property exemptions, debts and liabilities.

L. B. SISKIN.
ISAAC H. HARRIS.

37 Sworn to and subscribed before me, this 1st day of August, A. D. 1901.

[SEAL.]

ROB'T L. RHODES,
Notary Public, Baltimore, Md.

Summons.

BEAUFORT COUNTY,
Washington Township.

Justice's Court.

Before E. S. Simmons, J. P.

B. BALK, Plaintiff,
against
ISAAC H. HARRIS. Defendant,

State of North Carolina to any constable or other lawful officer of Beaufort county, Greeting:

You are hereby commanded to summons Isaac H. Harris to appear before me, at my office in Washington township, county of Beaufort, on the 13th day of August, 1896, at 10 o'clock a. m., to answer to the complaint of B. Balk for non-payment of the sum of one hundred and eighty dollars and — cents, due by account and demanded by said plaintiff.

Herein fail not, and of this summons make due return.

This 11th day of August, 1896.

E. S. SIMMONS,
Justice of the Peace.

The foregoing summons was indorsed as follows to-wit:

38 "(*Summons.*)

"WASHINGTON TOWNSHIP,
"*Beaufort County.*

"Before E. S. Simmons, J. P.

"B. BALK, Plaintiff,
"*against*
"ISAAC H. HARRIS, Defendant.

"Received August 11, 1896; served August 11, 1896, by reading the within summons to Isaac H. Harris.

"R. T. HODGES, *Sheriff.*

"Continued until 2d September, by consent.

"T. H. BLOUNT, *J. P.*"

Complaint.

Beaufort County Justice's Court.

Before T. H. Blount, Esq., J. P.

B. BALK
against
ISAAC H. HARRIS.

The plaintiff complains of the defendant and alleges:

1. That the defendant is indebted to him for money loaned at sundry times during July and August, 1896, in the sum of $180. That no part of the same has been paid, but all thereof is still due and unpaid, and defendant admits same.

Whereupon, plaintiff demands judgment in the sum of $180, with interest from August 1, 1896, and for costs.

J. H. SMALL,
Attorney for Plaintiff.

39 *Answer.*

NORTH CAROLINA,
Beaufort County, Washington Township.

Before Thos. H. Blount, J. P.

B. BALK
against
ISAAC H. HARRIS.

The defendant, Isaac H. Harris, answering the complaint herein, says:

1. That he admits that he was indebted to the plaintiff, B. Balk, in the sum of $180 for money borrowed by him from the said Balk.

2. That on the 6th day of August, A. D. 1896, an action was duly instituted by Jacob Epstein, trading as Baltimore Bargain House, against B. Balk, in the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, and of which action the said court had jurisdiction; and in which said action, upon the said day, an attachment was issued and was duly served upon the defendant in this action, the said Isaac H. Harris as garnishee, whereby the said defendant was commanded to appear before the said court on a day named in said writ of attachment, to-wit, on the second Monday in August, and show cause, if any, why the lands, tenements, goods, chattels and credits attached should not be condemned and execution thereof had and made to and for the use of

Jacob Epstein, trading as aforesaid. That this defendant appeared in said cause so pending and admitted under oath his indebtedness to the said B. Balk in the sum of $180 as aforesaid, and that thereupon a judgment was entered against the said Harris, as garnishee,
for the sum of $180, in favor of Jacob Epstein, trading as
40 aforesaid, and condemning the said amount. That execution duly issued thereon against this defendant. That this defendant has duly paid the said sum of $180 to Jacob Epstein, trading as aforesaid. That the judgment against this defendant in the said action, and the issuing of execution thereon, and the payment of the said sum to Jacob Epstein, trading as aforesaid, is a full and complete bar and defense by the defendant to this action, now prosecuted by the said Balk, and this defendant pleads the same in defense of and as a bar to this action.

Whereupon, defendant prays that he go without day and recover his cost, and that the action be dismissed.

CHAS. F. WARREN,
Attorney for Defendant.

Replication.

NORTH CAROLINA, }
Beaufort County. }

Superior Court.

B. BALK }
against }
ISAAC H. HARRIS. }

The plaintiff, replying to the answer of the defendant, says:

I. That he denies section 2 of the answer. He denies that any valid action was instituted in the courts of Maryland against this plaintiff by Jacob Epstein, or that any valid or legal service of process therein was made on this plaintiff, or that the alleged attachment pretended to have been issued therein was valid. He further denies that the courts of Maryland, as alleged, had jurisdiction in
said action or any action against the plaintiff. He denies
41 that any property of this plaintiff, subject to attachment, was or has been or is in the State of Maryland, or was so existing at the time the alleged action was instituted in the courts of Maryland. He denies that any execution issued against Isaac H. Harris in the alleged action instituted in the courts of Maryland. He denies that Isaac H. Harris, defendant herein, has paid to Jacob Epstein the sum of $180 or any sum, as alleged, or that he was required so to do. He denies that the allegations in section 2 of the answer constitute a bar or defense by the defendant to this action.

II. Referring further to the allegations in section 2 of the answer, this plaintiff avers that Isaac H. Harris, defendant herein, made no

defense and entered no proper plea therein, and did not contest the same.

III. That this plaintiff owns no real estate in North Carolina or elsewhere; that he does not own personal property of the value of $500, or in excess of his personal property exemption. That the personal property exemption of this plaintiff was set apart to him, as required by law, shortly prior to the institution of this action, and a part of his said exemption consisted of goods and merchandise, which he subsequently sold, and the said sum of $180 loaned by this plaintiff to the defendant was in part the proceeds of sales of the personal property exemption allotted to this plaintiff. That against any alleged debt of this plaintiff to Jacob Epstein, this plaintiff is entitled first to have his personal property exemption allotted to him as a resident of North Carolina, as provided by law.

JOHN H. SMALL,
Attorney for Plaintiff.

42 *Affidavit for Removal.*

NORTH CAROLINA,
Beaufort County, Washington Township.

Before E. S. Simmons, J. P.

B. BALK
against
ISAAC H. HARRIS.

Isaac H. Harris, being duly sworn, says: That he is unable to obtain justice before E. S. Simmons, J. P., who issued the summons in this cause, and he prays that the said action be removed before some other justice of the peace, as is allowed by section 907 of the Code.

ISAAC H. HARRIS.

Sworn to and subscribed before me, this the 14th day of August, 1896.

W. A. POTTS, *J. P.*

Order of Removal.

B. BALK
against
ISAAC H. HARRIS.

For the causes set out in the foregoing affidavit this action is removed before Thomas H. Blount, Esq., justice of the peace for Washington township, to be heard by him at the court-house in Washington, N. C., at 11 o'clock a. m., August 19, 1896.

This the 17th day of August, 1896.

E. S. SIMMONS, *J. P.*

43 *Bond.*

NORTH CAROLINA,
Beaufort County, Washington Township.

Before Thos. H. Blount, J. P.

B. BALK
against
ISAAC H. HARRIS.

Whereas, judgment was this day rendered in the above-entitled cause in favor of the plaintiff, B. Balk, and against the defendant, Isaac H. Harris, by Thomas H. Blount, a justice of the peace, before whom the same was tried, for the sum of $180, with interest thereon from date of summons in this cause, and also for the costs: And whereas, the defendant, Isaac H. Harris, has appealed from said judgment to the superior court of Beaufort county:

Now, therefore, we, Isaac H. Harris, principal, and L. B. Suskin, surety, do undertake and agree, if judgment shall be rendered against the appellant to pay the amount, together with all costs awarded against the said appellant in favor of the said plaintiff.

Witness our hands and seals, this the 4th day of September, 1896.

ISAAC H. HARRIS. [SEAL.]
L. B. SUSKIN. [SEAL.]

This bond is approved.
September 4, 1896.

THOS. H. BLOUNT, *J. P.*

44 *Return to Notice of Appeal.*

STATE OF NORTH CAROLINA,
Beaufort County.

Before T. H. Blount, Justice of the Peace.

B. BALK, Plaintiff,
against
ISAAC H. HARRIS, Defendant.

To the superior court of Beaufort county:

An appeal having been taken by the defendant, I. H. Harris, I, Thos. H. Blount, the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the 11th day of August, 1896, at the request of plaintiff, E. S. Simmons issued a summons in his favor and against the defendant, and set case to be heard before me, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office, and at the same time and place the parties personally appeared.

The plaintiff complained for non-payment of $180, loaned defendant from time to time.

The defendant denied the indebtedness, on the ground that by attachment under the laws of Maryland judgment had been had against him, and he claims that he had paid said judgment, having done so he was thereby relieved of payment to plaintiff.

Both parties introduced evidence upon the claims as made by them; and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the 2d day of September, 1896, for $180, with interest on $180 from 11th day of August, 1896, and for $1.30 cost, paid by plaintiff.

45 I also certify that on the 2d day of Septemb-r, 1896, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of 30 cents for making my return.

All of which I send, together with process, pleadings and other papers in the case, including a bond for $180 and costs.

Date, this 7th day of September, 1896.

THOS. H. BLOUNT,
Justice of the Peace.

Record in Epstein against Harris and Balk.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

At a session of the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, begun and held at the court-house in the city of Baltimore, in and for the city aforesaid, on the second Monday of May (being the 11th day of same month) in the year of our Lord 1896—present, the Honorable Albert Ritchie, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city, Stephen R. Mason, sheriff, Robert Ogle, clerk, among other were following proceedings, to-wit:

JACOB EPSTEIN (Trading as Baltimore Bargain House)
against
B. BALK.

Be it remembered, that heretofore, to wit, on the 6th day
46 of August, A. D. 1896, Jacob Epstein, the plaintiff in this action, appeared before the clerk of the superior court of Baltimore city, and made affidavit for an attachment against a non-

resident debtor, under and in pursuance of the statute in such case made and provided; and at the time of making said affidavit, produced and filed the open account by which the said B. Balk is so indebted, which said affidavit and open account are in the words, figures and tenor, following, to-wit:

Be it remembered, and it is hereby certified, that on this 6th day of August, in the year 1896, personally appeared before the subscriber, clerk of the superior court of Baltimore city, Jacob Epstein, and made oath on the five books of Moses, he being an Israelite, that B. Balk, not being a citizen of the State of Maryland, and not residing therein — justly and *bona fide* indebted unto him, the said Jacob Epstein, trading as Baltimore Bargain House, in the full and just sum of three hundred and forty-four dollars and twenty-four cents ($344.24), over and above all discounts. And at the same time the said Jacob Epstein produced to me the open accounts, on and by which the said B. Balk is so indebted, which are hereunto annexed. And the said Jacob Epstein did also make oath that he, the plaintiff, is credibly informed, and verily believes, that the said B. Balk is not a citizen of the State of Maryland, and does not reside therein.

ROBERT OGLE,
Clerk of the Superior Court of Baltimore City.

Statement.

Folio 187. BALTIMORE, *Aug.* 6, 1896.

Mr. B. Balk, Washington, N. C., to Baltimore Bargain House, Dr., importers and jobbers in general merchandise, 216 W. Baltimore St.

Terms net cash within thirty days. No discount. No dating.
We send statement of maturing account to enable you to compare with your books.

47 Accounts five days overdue will be drawn for at sight without further notice.

1895.		DUE.		
Aug.	29. To mdse.,	P. 1—496	$342.21	
"	" " "	D. B. Balk, Tl. 253	25.20	
Oct.	5. " "	Xl—77	107.20	
Nov.	24. " "	Tl. 734	94.63	
				$569.24
		CR.		
Oct.	3. Cash		$125.00	
Nov.	20. "		100.00	
				225.00
				$344.24

If this invoice is not in all respects as it should be, make your report to us at once.

5—191

Day-book XI, folio 77.

BALTIMORE, MD., *Oct. 5th*, 1895.

Order clerk, J. Dob.

Mr. B. Balk, Washington, N. C.; consigned by Baltimore Bargain House, Jacob Epstein, proprietor, importer and jobber general merchandise, 216 West Baltimore St.

902—4	lads. hose, 50		$2.00
3016—4	" " $7.72		3.10
238—1	" "		.65
999—5½	" " 65		3.25
550—4	" " 33		1.32
1	pants		6.75
1711—1	"		9.00
860—1	lads. coat		6.00
2	towels, 60		1.20
306—1	top shts		4.00
61—3	" " 1.30		3.90
1166—½	sweaters, $3.60		1.80
100—1	c. drs., $1.67½		1.68
1162—2	" $2.15		4.30
B. S.—2	under shts., $1.40		2.80
311—3	" " $2.25		6.75
C210—2	top shts., $4.37½		8.75
H154—1	"		4.90
4000—½	under shts., $10.90		1.82
98—1	top shts		6.00
216—1	under shts		3.50
217—1	"		3.50
7156—1	drs		6.74
48			
2178—2	susp'd'rs, 75		1.50
1626—1	"		2.15
F. Mar.—5	" 95		4.75
152—2	colonges, 65		1.30
3439—1	"		.35
2—3	pins, 11½		.34
725—1	cologne		.38
7R—1	bows		.65
1002—1	"		.22
5-4—1	laces		.20
4-4—2	c. laces, 32½		.65
1	needle cases		.85
3-4	needles, 19		.15
			$107.20

If this invoice is not in all respects as it should be, make your report to us at once.

Day Book Tl., folio 253.

BALTIMORE, MD., *Aug.* 29, 1895.

Order clerk, Saunders.

Mr. B. Balk, Washington, N. C.; consigned by Baltimore Bargain House, Jacob Epstein, proprietor, importer and jobber, general merchandise, 216 W. Baltimore street.

Delivered to B. Balk, 634 Hanover St., city.	Duplicate.
25 crash, 3½	.88
2 hair pins, 6½	.13
1 coll. buttons	.25
45—1 under shirts	$1.25
3R—½ bows, 40	.20
½ " 65	.32
28—12 R. hatfs	.50
349—1 "	.35
1–12 muslin shams, $4.75	.40
210R—1 doylies	.38
G10–4—1 tab. covers	1.05
Jab.—½ towels, 40	.20
480—½ " $2.50	1.25
1520—1 "	2.15
D—2 quilts, $1	2.00
Dar—1 overalls	2.90
19—1 Tor. lace	.21
5–11—1 "	.27
25—1 "	.55
B. B. H—2 collars 60	1.20
O. N. T—2 cotton, 45, 7 and 2	.82
F 32—1 pins	.21
49	
7—1 hair pins	.11
79–10—1 web	.50
1 "	.75
40—1 ag. buttons	.09
6064—1 coll. buttons	.18
104A—1 l. pencils	.05
465—1 "	.10
1 A. & M. bands	.25
212—1–12 shears, $2.65	.22
265—1–12 " $3.15	.26
S. D. R.—2 soap, 30	.60
3—1 susp	1.18
400—½ bows, 75	.38
00—1 cards	.65
Smith—½ needles, 85	.21
For'd	$23.00

	For'd		23.00
3015—½	scf. pins, 45	.22	
17—½	coll. butts., 19	.09	
64—½	" 22	.11	
4262—1–12	l. c. butts., $1.65	.14	
½	specs., $3.50	.50	
375—½	purses, $2.12½	1.06	
			25.20

If this invoice is not in all respects as it should be, make your report to us at once.

Day-book Tl., folio 734.

BALTIMORE, MD., *Nov.* 22, 1895.

Order clerk, Burke.

Mr. B. Balk, Washington, N. C.; consigned by Baltimore Bargain House, Jacob Epstein, proprietor, importer and jobber general merchandise, 216 West Baltimore St.

333. 700—4	half hose, 40	$1.60	
999—4	" 65	2.60	
622 D—4	lds. hose, 70	2.80	
160—4	" 45	1.80	
32–92—2	mos., 72½	1.45	
6044—2	col. butt., 18	.36	
152—2	cologne, 65	1.30	
242—1	suspenders	1.25	
1626—1	"	2.15	
F—2	" 95	1.90	
56—1	"	.75	
27–10—2	hoops, 33	.66	
50			
808—9	boys' hose, $1.18	10.62	
6101—3	" $1.18	3.54	
1711—1	pants	9.00	
596—1	caps	2.00	
55—5	under shts., $2.25	11.25	
Lead—1	"	3.25	
1300—1	"	7.75	
20–20—1	"	6.38	
B2—1	"	4.20	
T—1	top shts	4.20	
330—2	lds. vests, $2.25	4.50	
10—1	"	3.60	
105—1	sweaters	3.60	
999—1	"	2.12	
			$94.63

If this invoice is not in all respects as it should be, make your report to us at once.

Day-book P 1, folio 496.

BALTIMORE, MD., *Aug.* 29, 1895.

Order clerk, Coplan.

Mr. B. Balk, Little Washington, N. C.; consigned by Baltimore Bargain House, Jacob Epstein, proprietor, importer and jobber general merchandise, 216 W. Baltimore St.

Duplicate.

5–4—3	oil cloth, $1.20	$7.75
Law.—3	collars, 55	1.65
Ras.—4	" 59	2.20
5—1	dz. shoe brus	1.50
Dsg.—3	web., 21	.63
2	" 55	1.10
2—1	rings	.70
1266—1	"	1.40
4	dz. studs, 9	.36
½	coll. butts. sets, $2.00	1.00
1	rsl. studs	1.25
½	lace pins, $1.85	.93
1	coll. butt	.60
1	" "	.22
2	" " 25	.50
½	lace pins, $3.75	1.88
Seg.—2	brl. scf., 27	.55
1	chairs	6.50
395—1	cologne	.38
3439—1	"	.35

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Jot.—2	ties, 25	.50
½	dz. bows, 65	.33
559—1	scarf	2.00
1	needle cases	.50
1050—1	pencil	.60
1	lead	.35
1	knives	.85
Niz.—1	cuff hldrs	.70
1	arm brand	.40
1	" "	.25
O. N. T.—4	cotton, $4.57 & 2 per cent	1.64
E. & G.—10	" 17	1.70
90—1	gr. button	.85
6064—1	" "	.18
7841—2	" " 50	1.00
12—1	ag	.25
50—½	" $1.00	.50
30—½	ag. butt., 80	.41

XXX–6—½	M envel., 88	.22
800–7—½	shears, $2.75	1.38
506–4—½	" $1.00	.50
7—½	" $3.15	1.57
224—2	R. & F., 80	1.60
301—1	"	.69
2008—1	"	.85
250—½	tea spoon, $1.50	.38
500—½	table spoon, $3.00	1.00
318—1	specs	3.50
6843—1	"	2.00
1663—1	purses	.35
3389—1	"	.22½
360—1	raz. strop	1.25
76—1	pipes	.75
23—1	"	1.25
1	hair pin	.45
20–5—1	writ. paper	.45
Bon—2	soap, 20	.40
T. & R.—1	"	.37½
3	razors, 45	1.35
½	" $0.50	1.63
1	garters	.45
12—1	condts	.27
7—1	"	.58
26—1	"	.45
8—1	"	.72½

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S2—2	safety pins, 23	.46
S3—2	safety " 30	.60
M. C.—2	" " 25	.50
139—1	M. boxes	.75
51—1	"	.39
1	garters	.65
75H—1	5–12 bibs, 60	.85
Fire—2	susp., 90	1.80
680—1	"	1.60
Jot—5	" $1.00	5.00
Jot—2	" 60	1.20
4 x 11–44—1	play card	1.15
999—1	" "	.75
2	hdks. 35	.70
835 W—1	"	.60
145 D—1	"	.40
1	"	.28
1211—1	"	.28
800—1	"	.40
750—1	"	.38

202—2	" 22	.44
1	"	.30
64—2	" 30	.60
320—2	" 30	.60
60C—5	" 22	1.13
124—1	"	.35
250—1	"	.35
30—1	T. R.	.58
24—2	" 26	.53
24—1	blue	.35
1	hdks	.30
Jot—1	sweaters	2.13
3	Fr. trim, 19	.57
531—2	Am. lace, 35	.70
9—2	tor., 11	.22
13—2	" 15	.30
11—2	" 13	.26
8—2	" 10	.20
2—2	" 3½	.07
1—2	" 2	.05
4—2	" 5½	.11
5—2	" 6½	.13
6—2	" 7½	.15
7—2	" 9	.18
15—2	" 17	.34
17—2	" 19	.38

53

350—1	towels	.60
44—1	"	.87½
Wt—1	"	1.45
679—1	T. R. tidies	2.25
100—1	doylies	.38
1	"	.35
8—4—2	covers, 50	1.00
8—10—1—6	T. covers, $4.25	.71
71—1	top sht	2.75
702—1	nubies	5.50
1071—1	gloves	1.89
1011—2	hose, 65	1.30
999—2	" 65	1.30
775—3	" 45	1.35
902—3	lad., 50	1.50
667—2	" 86	1.72
3016—2	" $7.72	1.55
200—1	skirt	3.60
B A—1	"	4.00
N. P. W.—1—2	lad. vest, $7.50	3.75
1270—1—2	" $4.00	2.00
1070—1	"	3.25
330—1	"	2.18

H–9—½	top sht., $4.20		2.10
1–54—½	"	$4.90	2.45
90—½	"	$4.90	2.45
98—½	"	$6.00	3.00
217—½	"	$4.00	2.00
216—½	"	$4.00	2.00
444—1	"		4.00
C210—1	"		4.38
4072—1	"		4.00
377—1	"		3.65
A1905—½	"	$24.00	12.00
7605—1	"		12.00
661—1	"		7.90
825—1	"		1.30
1000—½	under sht., $2.35		1.18
Led—½	"	$3.68	1.84
B8—1	"		1.50
311—1	"		2.25
1205—1	"		3.32
440—1	"		3.55
7156—1	"		7.74
T. W.—1	"		6.62

54

1200—½	under shts., $2.35		1.18
1200—½	"	$4.50	2.25
Avers.—1	drws. & undersht		7.75
100—1	"	"	1.67½
125—1	"	"	1.85
447—1	jumpers		4.38
347—1	O. alls		4.38
502—1	"		2.90
1155—1	"		2.25
8197—2	suit, $4.25		8.50
9200—2	" $4.25		8.50
8000—2	" $4.25		8.59
612—4	boys', $1.00		4.00
484—1	knee pants		2.00
6125—1	"		10.50
6120—1	"		4.80
7093—½	"	$24.00	12.00
1029—1	"		4.50
1072—½	"	$6.75	3.38
Aig—6	spread, 80		4.80
C. Don—4	" 77.		3.10
Per 10—4—3	blanket, 42		1.26
525—½	umbrella, $7.50		3.75
1256—½	"	$4.75	2.38
			$342.21

(E. & O. E.)

And thereupon the said plaintiff, by G. W. S. Musgrave, Esq., his attorney, in pursance of the statute aforesaid, prosecuted and sued forth out of the said court here, the writ of the State of Maryland of attachment to the sheriff of Baltimore city, directed as follows, to-wit:

State of Maryland to the sheriff of Baltimore city, Greeting:

Whereas, Jacob Epstein has appeared before the clerk of
[SEAL.] the superior court of Baltimore city, and produced and filed in court the open account as an evidence of indebtedness, and at the same time also made oath in due form of law that a certain B. Balk is justly and *bona fide* indebted to him, the
55 said Jacob Epstein, trading as Baltimore Bargain House, in the sum of three hundred and forty-four dollars and twenty-four cents ($344.24) over and above all discount, and that the said Jacob Epstein, the plaintiff, is credibly informed, and verily believes, that the said B. Balk is not a citizen of the State of Maryland and does not reside therein.

We therefore command you, that you attach the lands, tenements, goods, chattels and credits of the said B. Balk to the value of $344.24, current money, and cost of this attachment, according to the form of the Code of Public General Laws in such cases made and provided. And we further command you, that you make known unto the person or persons in whose hands you shall lay this attachment, that he, she or they be and appear before the judge of the superior court of Baltimore city, at the court-house in the same city, on the second Monday of August, inst., to show cause (if any he, she or they have) why the lands, tenements, goods, chattels and credits by you attached, by virtue of this writ, in his, her or their hands, shall not be condemned, and execution thereof had and made to and for the use of the said Jacob Epstein, trading as aforesaid, as of the lands, tenements, goods, chattels and credits of the aforesaid B. Balk, according to the Code of Public General Laws in such cases made and provided, if to him, her or them it shall seem meet; and how you shall execute this writ, make known to the judge of the superior court of Baltimore city, at the day and place aforesaid, and have you then and there this writ.

Witness, the Honorable Henry D. Harlan, chief judge of the supreme bench of Baltimore city, the 11th day of May, in the year of our Lord 1896.

Issued 6th day of August, 1896.

ROB'T OGLE,
Clerk of the Superior Court of Baltimore City.

56 And the said plaintiff, by his attorney aforesaid, at the same time prosecuted and sued forth the writ of the State of Maryland of summons, directed to the sheriff of Baltimore city, aforesaid, as follows, to wit:

STATE OF MARYLAND, *Baltimore City,* } *To-wit:*

To the sheriff of Baltimore city, Greeting:

You are hereby commanded to summon B. Balk to [SEAL.] appear before the superior court of Baltimore city, to be held at the court-house in the same city, on the second Monday of August, inst., to answer an action at the suit of Jacob Epstein, trading as Baltimore Bargain House, and have you then and there this writ.

Witness, the Honorable Henry D. Harlan, chief judge of the supreme bench of Baltimore city, the 11th day of May, 1896.

Issued 6th day of August, 1896.

ROBERT OGLE, *Clerk.*

And thereupon the said plaintiff, by his attorney aforesaid, files in court here the following short note, to-wit:

Action in the Superior Court of Baltimore City, May Term, 1896.

JACOB EPSTEIN, Trading as Baltimore Bargain House,
against
B. BALK.

This suit is instituted to recover the sum of $344.24, due and owing from the defendant to the plaintiff for money payable by the defendant to the plaintiff.

1. For goods bargained and sold by the plaintiff to the defendant.

57 2. And for work done and materials provided by the plaintiff for the defendant at his request.

3. And for money lent by the plaintiff to the defendant.

4. And for money paid by the plaintiff for the defendant, at his request.

5. And for money received by the defendant for the use of the plaintiff.

6. And for money found to be due from the defendant to the plaintiff, on accounts stated between them.

G. W. S. MUSGRAVE,
Attorney for Plaintiff.

A copy of which said short note was made out and sent with the writs aforesaid to the sheriff of Baltimore city aforesaid, thereon indorsed, to-wit: "Copy of short note within to be set up at the court-house door."

At which said second Monday of August, to-wit, in the year A. D. 1896, being the return day of the foregoing writs, come into our said court here the said plaintiff by his attorney aforesaid, and the sheriff

of Baltimore city, to-wit, Stephen R. Mason, gentleman, and makes return of the said writ of attachment to the court here, thus indorsed, to-wit:

"Laid in the hands of Isaac H. Harris on the 6th day of August, 1896, at 4.07 o'clock p. m., in the presence of Charles N. Whittle, and garnishee summons.

"STEPHEN R. MASON, *Sheriff.*"

And at the same time the said sheriff to whom the said writ of summons was directed and the copy of the short note was sent, makes return of the said writ of summons to the court here, thus indorsed, to-wit:

58 "*Non est.* Copy of short note set up at the court-house door.

"STEPHEN R. MASON, *Sheriff.*"

And the said defendant, B. Balk, being called, does not come.

And the said Isaac H. Harris, garnishee, in whose hands or possession the goods, chattels, lands, tenements and credits of the said defendant were so as aforesaid attached, being also called, come into our said court here, by W. N. Ewing, his attorney, and files the following confession of assets, to-wit:

BALTIMORE CITY:

In the Superior Court.

JACOB EPSTEIN, Trading as Baltimore Bargain House,
against
B. BALK; ISAAC H. HARRIS, Garnishee.

And the said Isaac H. Harris, the garnishee in the above case, by W. N. Ewing, his attorney, confesses that there is justly due and owing by him to the defendant the sum of one hundred and eighty dollars ($180), as per the annexed account; and he further says that beside the said sum of $180 he had not at the time of laying the said attachment in his hands, nor at any time since has he had, nor has he now any other of the goods, chattels, tenements or credits of the said B. Balk, and this he is ready to verify.

W. N. EWING,
Attorney for Garnishee.

STATE OF NORTH CAROLINA,
Beaufort County.

I. H. Harris, being by me duly sworn, makes oath and deposes:
That he has in his possession, as the property of B. Balk, one
59 hundred and eighty dollars ($180), and the amount has been attached by Jacob Epstein, of Baltimore, Md.

I. H. HARRIS.

Sworn and subscribed before me, this 11th day of August, 1896.

THOS. J. LATHAM,
Notary Public.

[NOTARIAL SEAL.]

And thereupon, the following order of counsel and order of court were filed in said cause, to-wit:

Mr. Clerk:

Please enter an order of *condemnation against* the garnishee for $180, the amount confessed.

G. W. S. MUSGRAVE,
For Plaintiff.
W. N. EWING,
For Garnishee.

Let judgment be entered as prayed, for $180.

HENRY D. HARLAN.

Memorandum.

Judgment of condemnation against the garnishee was entered in favor of the plaintiff for $180, the amount confessed in the hands of the garnishee.

Plaintiff's costs, $—. Defendant's costs, $—.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

I, Robert Ogle, clerk of the superior court of Baltimore city, do hereby certify that the aforegoing is a full, true and entire transcript taken from the record and proceedings of the said court in the therein entitled cause.

60 In testimony whereof, I hereunto set my hand and affix the seal of the superior court of Baltimore city aforesaid, on the 26th day of August, 1896.

ROBERT OGLE,
Clerk Superior Court of Baltimore City.

[SEAL.]

MARYLAND, *sct:*

I, Charles E. Phelps, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the superior court of Baltimore city, in the eighth judicial circuit of said State, do certify that the foregoing attestation of Robert Ogle, clerk of the said superior court of Baltimore city, is in due form and by the proper officer.

Give under my hand, at the city of Baltimore, this 28th day of August, in the year 1896.

CHARLES E. PHELPS.

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I, Robert Ogle, clerk of the superior court of Baltimore city, do hereby certify that the Honorable Charles E. Phelps, who has certified and signed the above attestation, was, at the time of so doing, presiding judge of the superior court of Baltimore city, in the eighth judicial circuit of the State of Maryland, duly commissioned and qualified; and that to all acts done by him in that capacity, full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof, I hereunto subscribe my name and affix the seal of the superior court of Baltimore city, on this 28th day of August, A. D. 1896.

ROBERT OGLE,

[SEAL.] *Clerk of the Superior Court of Baltimore City.*

61 *Affidavit.*

NORTH CAROLINA, *Beaufort County.* }

In the Superior Court, Spring Term, 1901.

B. BALK *against* ISAAC H. HARRIS. }

The defendant, Isaac H. Harris, and L. B. Suskin, surety upon defendant's undertaking to stay execution pending the appeal from the justice of the peace, respectfully represent: That since this action has been pending in the superior court of Beaufort county, the defendant, Isaac H. Harris, has been adjudged a bankrupt and has been discharged under the act of Congress from all debts and claims which are made provable by said act against his estate and which existed on the 7th day of April, A. D. 1899. That this defendant and his said surety pray that the defendant be permitted to plead the said discharge in bankruptcy as a defense and bar to this action.

ISAAC H. HARRIS,
L. B. SUSKIN,
By CHAS. F. WARREN, *Attorney.*

Issue.

BALK *against* HARRIS. }

Is the defendant indebted to the plaintiff; and if so, in what amount?

Answer. "$180, with interest on the same from August 11, 1896."

62 *Judgment.*

NORTH CAROLINA:

Superior Court, Beaufort County, May Term, 1901.

B. BALK
against
ISAAC H. HARRIS.

This cause coming on to be heard at this, the May term, 1901, of the superior court of Beaufort county, and being heard before his honor O. H. Allen, judge presiding, and a jury, consisting of G. B. Keech and eleven other good and lawful men, as will appear by the record, having been duly sworn and empanelled to try the issues joined between the parties; and the said jury having answered the said issues as set out in the record of this court, it is now ordered, adjudged and decreed that the plaintiff recover of the defendant and L. B. Suskin, the surety upon his stay or appeal bond, the sum of one hundred and eighty dollars ($180), with interest thereon from the 11th day of August, 1896, until paid, and the cost of this action, to be taxed by the clerk.

O. H. ALLEN,
Judge Presiding.

Case on Appeal.

NORTH CAROLINA,
Beaufort County.

In the Superior Court, Spring Term, 1901.

B. BALK
against
ISAAC H. HARRIS.

63 This was a civil action tried before his honor O. H. Allen, judge presiding, and a jury, at spring term, 1901, of the superior court of Beaufort county. The action was originally begun before a justice of the peace and was taken by appeal to the superior court of the said county. The summons, pleadings and all other proceedings in this cause before the justice of the peace and in the superior court are herewith sent.

Upon the trial of the cause the following evidence was introduced by the plaintiff:

JOHN H. SMALL testified:

I was the attorney of the plaintiff, Balk, before the justice of the peace and upon the former trial of this case in the superior court before Judge Timberlake. I knew the plaintiff, B. Balk. He re-

sided in North Carolina from July 1 to September 1, 1896. He continued to reside in the State for more than a year afterwards, perhaps longer. He had resided in the State for some years prior to July 1, 1896. I knew Isaac H. Harris, the defendant. He resided in July and August, 1896, in the town of Washington, N. C., and had resided here several years before then, and resided here several years after that time. I heard the testimony of Harris upon the former trial of this case in the superior court. I think he testified before the justice of the peace also. He admitted that he owed Balk $180, and that he borrowed it during July, 1896. He testified that he went to Baltimore about August 1, 1896, and that he borrowed the last installment a few days before he went to Baltimore, and that he promised to pay the debt to Balk. He said that nothing was said when the money was borrowed where it was to be paid, but that he expected it to be repaid here in Washington. As attorney for Balk I demanded payment of Harris before the suit was brought, and he admitted that the debt was due.

64 He testified on the former trial in the superior court that he went to Baltimore on or about August 1, 1896, to buy goods, and that he expected to return in a few days after completing his purchases. I do not recall how much money Harris testified he had with him, but he said that when the garnishment was served on him that he had none of the original money borrowed from Balk. I do not remember how long he said he stayed in Baltimore after garnishment. He said that he employed no lawyer and did not propose to contest it. He may have stated this last to me personally. He testified that he paid the money to Chas. F. Warren, Epstein's attorney, after his return to the town of Washington. He testified that he gave no bond for the payment of this money in the proceeding in Baltimore.

Upon cross examination the witness, SMALL, testified:

Harris testified upon the former trial that it was the same $180 debt he owed Balk which was garnisheed in Baltimore. He said that he in no way communicated to Epstein the fact that he owed Balk. He testified that he paid the money to Chas. F. Warren, attorney for Epstein, in August, 1896, after his return from Baltimore to the town of Washington. He said that it was after he was summoned in this case before the justice of the peace. As attorney for Balk I made out the statement of the case on appeal from the judgment rendered on the trial before Judge Timberlake. The judge adopted my statement of the case as to a part of the testimony of Harris. In my statement of the case on appeal I set out, among other things testified to by Harris, the following: "After the garnishment I paid the money to Chas. F. Warren, attorney for Epstein, after my return from Baltimore, in August, 1896." I did

65 not set it out in my statement of the case that he said that he had paid the money after the service of the summons in this case.

Harris testified that he gave no note or written obligation for the payment of the money to Balk. He testified also that he did not tell them in Baltimore that he owed Balk anything. He further testified that, when he came back to the town of Washington, he made the affidavit filed in the Maryland action, stating that he owed Balk this debt and that he sent this affidavit to Baltimore. He testified that when he paid this money to Chas. F. Warren he had no understanding with him that he was to hold the money until this case was decided. He testified that he paid Mr. Warren as soon as he found that judgment had been rendered against him in Baltimore. He said he paid it because parties from whom he had bought goods would not ship them to him. He said that he had never told anyone before he left Washington to go to Baltimore that he owed Balk $180. He said that Balk told him before he went to Baltimore that if Epstein would give him a clean receipt for his old debt he would go to Baltimore and buy from him five or six hundred dollars' worth of goods and would pay cash for them. Harris testified that this was why he sent a telegram to Balk from Baltimore. He said Epstein knew nothing about the telegram. I think Harris' business relations were largely with Baltimore, and that he purchased his goods in that market. Harris was a merchant in Washington, N. C., and was engaged in the dry goods business. This case was tried before Judge Timberlake at fall term, 1896, of the superior court of Beaufort county.

(2.) The defendant, Harris, introduced the following evidence, to-wit:

66 (1.) Vol. I of the Public General Laws of the State of Maryland, adopted by the General Assembly of Maryland March 14, 1888, and purporting to have been published by authority of the State of Maryland. That part of the said book was offered relating to attachments, being article IX. The said article was a printed copy of the laws of Maryland relating to attachments.

(2.) Transcript of the record of the cause in the superior court of Baltimore city, eighth judicial circuit of the State of Maryland, entitled Jacob Epstein, trading as Baltimore Bargain House against B. Balk and garnishment therein of the defendant, Harris. The entire record in said case is made a part of the case on appeal.

(3.) At the close of the evidence the plaintiff requested the court to charge the jury as follows: (1) That the garnishee judgment in the courts of Maryland, entitled Jacob Epstein against B. Balk and Isaac H. Harris, garnishee, is void, and that any payment by defendant, Harris, to Jacob Epstein of the $180 in question was a nullity, and the defendant can not set up any such payment as a defense to this action or as a plea in bar thereto. (2) That if you believe the evidence the plaintiff is entitled to recover of the defendant, Harris, the sum of $180, with interest.

(4.) The following issue was submitted to the jury, and they responded thereto as follows, to-wit:

Is the defendant indebted to the plaintiff, and if so, in what amount?

Answer. "One hundred and eighty dollars, with interest on the same from August 11, 1896.

(5.) The court charged the jury, that if they believed the evidence in the case they should answer the above issue as above set forth, and that upon all the evidence in the cause the plaintiff was entitled to recover of the defendant the sum of $180, with interest from the time the summons in this case was issued, on August 11, 1896.

67 (To this charge the defendant excepted.—Exception 1.)

The jury responded to the above issue as stated. Judgment was rendered in favor of the plaintiff and against the defendant and L. B. Suskin, his surety, and defendant excepted.

(6.) At spring term, 1901, of the superior court of Beaufort county, before this cause was called for trial, the defendant, through his counsel, in behalf of the defendant and L. B. Suskin, surety upon his undertaking, moved that he be permitted to file an answer alleging the discharge of defendant in bankruptcy, pending the appeal of this case in the superior court, and that he be permitted to plead the same as a defense and bar to this action.

(The court refused to allow the defendant to plead the said discharge in bankruptcy, and defendant excepted. Exception 2.)

(7.) The defendant moved for a new trial upon the following grounds, to-wit:

(1.) That the court erred in refusing to allow the defendant to plead his discharge in bankruptcy as a defense and bar to the action.

(2.) That the judgment of the State of Maryland and all proceedings prior to the said judgment in the case of Jacob Epstein, trading as Baltimore Bargain House, against B. Balk and Isaac H. Harris, garnishee, were in strict conformity to the laws of the State of Maryland relating to attachment and garnishment, and that under the charge of the court to the jury in this cause full faith and credit was denied to the record and judgment in the said case.

(3.) That the court erred in charging the jury that the judgment of the Maryland court was not a defense and bar to the present action.

(4.) That the court erred in charging that the judgment of

68 the Maryland court and the satisfaction of that judgment by defendant, Harris, is not a defense and bar to the present action.

Motion for a new trial overruled, and defendant excepted. Judgment in favor of plaintiff, and defendant excepted. Appeal by defendant to the supreme court. Bond in the sum of $25 adjudged sufficient, unless defendant is allowed to plead as a pauper.

Defendant assigns as error in the supreme court the same grounds assigned upon the motion for a new trial in the superior court.

July 2, 1901.

The above is agreed to as the case on appeal.

(Signed) CHAS. F. WARREN,
Attorney for Defendants.

(Signed) SMALL & MACLEAN,
Attorneys for Plaintiff.

Clerk's Certificate.

NORTH CAROLINA,
Beaufort County.

B. BALK
against
ISAAC H. HARRIS.

I, L. R. Mayo, clerk of the superior court of Beaufort county, North Carolina, do hereby certify that the foregoing is a true and correct copy of the records in the case on appeal in B. Balk against Isaac H. Harris, as the same appears of record in my office.

Witness my hand and official seal, this the 14th day of August, 1901.

L. R. MAYO,
[SEAL.] *Clerk of the Superior Court of Beaufort County.*

Docket entries.—Appeal docketed Aug. 19, 1901—Submitted on brief May 24, 1901. Opinion handed down June 17, 1901, as follows:

69 February Term, 1902.

B. BALK
v.
ISAAC H. HARRIS.

FURCHES, *C. J.:*

This is an action commenced before a justice of the peace to recover $180, carried from the justice's court to the superior court, and from that court to this by successive appeals.

This is the third time it has stood upon the docket of this court for hearing and review of the court below, and of this court. The opinion of the court when it was first here is reported in 122 N. C., 64, and the opinion when here the second time on petition to rehear is reported in 124 N. C., 467. 45 L. R. A., 257, 70 Am. St. Rep., 606. It has been since tried in the superior court, and is here again on appeal.

There is but one point presented in this appeal, if we adhere to our former opinion rendered on the petition to rehear. But we are now asked to abandon the ground upon which that decision rests, and put the opinion in this appeal upon the ground stated in the first

opinion, "that is may present a Federal question." This we cannot do without reversing our judgment and adopting the arguments in the first opinion, which we have admitted were not tenable, and were expressly abandoned in the second opinion—124 N. C., 467, 45 L. R. A., 257, 70 Am. St. Rep., 606.

The other question presented by the record is an application by the defendant to plead his discharge in bankruptcy, which was refused by the court. At spring term, 1901, before the case was tried, the defendant presented to the court the following motion in writing: "The defendant, Isaac H. Harris, and L. B. Suskin, surety upon defendant's undertaking, to stay execution pending the appeal from the justice of the peace, respectfully represents that since this action has been pending in the superior court of Beaufort county, the defendant, Isaac H. Harris, has been adjudged a bankrupt, and has been discharged under the act of Congress from all debts and claims, which are made payable by said act against his estate, and which existed on the 7th of April, A. D. 1899; that this defendant and his surety pray that the defendant be permitted to plead the said discharge in bankruptcy as a defense and bar to this action." The court, in refusing this motion, gave no reason for doing so,
70 and the plaintiff contends that the court refused to allow the motion as a matter of discretion; while the defendant contends that it was not a motion appealing to the discretion of the court, and that he was entitled to have it allowed as a matter of legal right.

It has been often decided by this court that the right to allow or refuse to allow an amendment, by setting up a new defense or otherwise, was a matter of discretion with the court, and while this discretion should be liberally exercised, that it was not reviewable on appeal to this court. Clark's Code (3rd edition), sec. 273; that it was discretionary whether the court would allow an amendment setting up the statute of limitation, Smith *v.* Smith, 123 N. C., 229; though it is said in that case that there are some exceptions to this rule. And while our attention has not been called to any authority directly upon this point, and in the limited time we have, we have not been able to put our hands upon any.

But it seems to us that "a plea since the last continuance" is not what would be strictly termed an amendment, but more in the nature of a supplemental pleading—something more than was pleaded before. Such pleas must be made by leave of court, that is, they must have the sanction of the court, and the opposing party must have an opportunity to be heard. This is and should be so, whether it is a matter of discretion with the court or a right the party has to insist on its being filed as a matter of law.

It therefore seems to us that in many cases, as in this case, the court had the discretion to allow the defendant to file his answer setting up his new defense, and the plaintiff would have had no right of appeal. But the defendant, on the trial, would have been compelled to show the defendant's discharge was a discharge from

this debt under the bankrupt act. The court may have had the discretion to allow this plea to be made, as that would not be a determination of the rights of the parties. But to entitle the defendant as a matter of law to file such plea, it must appear from the petition that the facts stated, if true, would be a good defense and a bar to the plaintiff's action. The court is to be the judge of this, and if the court should hold that the facts set forth, if true, would not be a bar to the plaintiff's action and refuse to allow the plea, when the
71 facts alleged, if true, would be a bar to the action, this court would review its action. But if the petition does not set forth facts which, if true, would be a bar to the plaintiff's recovery, then the court is not bound to allow the plea to be filed; and if it is refused without assigning any reason, it will be presumed that it was refused as a matter of discretion, and this court will not review its action. 21 Enc. Pl. and Prac., 59, and note 1.

We do not think the facts stated in this petition are sufficient to make it the duty of the court, as a matter of law, to allow the plea. It does not state that the defendant has obtained his discharge since the last continuance of the action; nor does it show that this debt or claim of the plaintiff was scheduled in the bankrupt proceeding; nor does it show that the plaintiff had knowledge of the proceedings in bankruptcy in time to have proved his debt and shared in the distribution of the assets of the defendant's estate in bankruptcy.

We do not see that the cases cited by the defendant are in point. Sanderson *v.* Daily, 83 N. C., 67, and Dawson *v.* Hartsfield, 79 N. C., 334, are applications to revive dormant judgment, and it has been often held by this court that in such cases as those, the defendant may plead anything that has occurred since the rendition of the judgment. Bank *v.* Swink, 129 N. C., 255. And the case of Paschal *v.* Bullock, 80 N. C., 329, was a motion to recall an execution that the defendant might plead his discharge in bankruptcy; but the motion was not allowed, and upon appeal to this court, the ruling of the court below was affirmed. And in the discussion of that case, it is observed by this court that the defendant had, before that, the opportunity to plead his discharge, and did not do so. It does not appear in this case that the defendant had before had the opportunity to plead his discharge. But, as he is asking to plead what he does not have the right to do without the permission of the court, we think to make it the legal duty of the court to allow the plea, it should have affirmatively appeared in the petition that he had not had—that is, facts should have been stated showing that he had not before had such opportunity.

As we see no error, the judgment is affirmed.

72 *Judgment, February Term*, 1902.

(Title of Cause.)

This cause came on to be argued upon the transcript of the record from the superior court of Beaufort county:—upon consideration

whereof, this court is of opinion that there is *no* error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable David M. Furches, chief justice, be certified to the said superior court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant & surety do pay the costs of the appeal in this court incurred, to-wit, the sum of fourteen 30/100 dollars ($14.30), and execution issue therefor.

[Seal Supreme Court of the State of North Carolina.]

——— ———.

73 *Petition of Defendant to Rehear.*

To the honorable the supreme court of North Carolina:

The petition of Isaac H. Harris respectfully represents:

(1.) That this action was brought against him on August 11, 1896, by the plaintiff, B. Balk, before a justice of the peace of Beaufort county, North Carolina, for the recovery of the sum of one hundred and eighty dollars. That while the defendant was in the city of Baltimore one Jacob Epstein, trading as "Baltimore Bargain House," a creditor of the said Balk, garnisheed your petitioner, and the debt due by your petitioner to said Balk was condemned for the satisfaction of the debt due by the said Balk to the said Epstein. That in the action brought against your petitioner the judgment of the court of Maryland was pleaded in defence and bar of the claim and demand of plaintiff against your petitioner. From a judgment against your petitioner before the justice of the peace he appealed to the superior court of the county of Beaufort. That upon the trial of the said action in the superior court of the said county, his honor E. W. Timberlake, judge presiding, there was a judgment rendered in favor of your petitioner, and from this judgment the plaintiff,

74 B. Balk, appealed to the supreme court. That the said appeal was heard by the said court at February term, 1898, and is reported in 122 N. C., 64, which is referred to for all purposes, and is made a part hereof, the same as if it were fully set forth herein. That by its judgment at the said term the supreme court found that there was error.

(2.) That your petitioner, believing, and being advised by his counsel, that the grounds upon which the said case at the said term was decided against your petitioner, to-wit, the grounds stated in sections 3 and 4 of the syllabus of the said case were erroneous in law, in due time filed a petition for the rehearing of the said case. That at February term, 1899, of the supreme court the said rehearing was had. That the oral argument for your petitioner was made by his attorney, Chas. F. Warren, who earnestly contended and in-

sisted that both of the aforesaid grounds upon which the case was decided against your petitioner at February term, 1898, were erroneous in law. And your petitioner and his counsel still insist that they were erroneous, and they neither ask nor desire that the court should ever again base its opinion upon either of the said grounds, and they respectfully submit that at no time have they ever asked or argued that the court should base its opinion upon either of said grounds. That any statement to the contrary is based upon a misconception and misunderstanding of the printed argument of the said attorney, filed at February term, 1902, of the supreme court, when the case was again before that court. That upon the said rehearing, at February term, 1899, your petitioner, through his counsel, Chas. F. Warren, in addition to the oral argument made by him, also filed a printed brief, the work of G. W. S. Musgrove, an associate counsel for petitioner, but who was not an attorney practicing in the supreme court of North Carolina. That in this printed
75 argument and brief your petitioner again earnestly insisted and contended that both of the grounds above set forth, upon which the decision was rendered against him, were erroneous in law, and your petitioner and his counsel have at no time asserted to the contrary.

(3.) That upon the said rehearing the petition was dismissed, and thereby the judgment of the court, which upon the original hearing found that the court below had erred, still remained; but your petitioner respectfully submits that the court upon the rehearing, while finding no error upon which it could reverse its former judgment, yet upon such rehearing based its opinion and judgment upon the ground that the situs of the debt garnisheed by the Maryland court was in North Carolina, where your petitioner resided, and the fact that your petitioner was transiently in the State of Maryland and was there served with process, gave the Maryland court no jurisdiction, and that consequently the Maryland judgment was void. That the court, while not expressly doing so, still, by strong implication, repudiated the two grounds upon which they had based their decision against your petitioner at February term, 1898. The court, at the conclusion of its opinion at the rehearing, 124 N. C., 471, used this language: "We reaffirm our former decision, but after the benefit of the able and exhaustive argument upon the rehearing, for an entirely different reason from that given on the first hearing." That your petitioner is induced to believe that a further examination by the court, aided by the argument of his attorney, convinced the court that neither of the positions upon which the opinion upon the original hearing (122 N. C., 64) was based was sound in law. And your petitioner and his counsel have never sought to have the court to again occupy either of the untenable positions of the
76 first opinion which, in effect, the court had abandoned, and they do not now so ask the court, but they do ask the court to repudiate in express language both of those grounds, and to base

its opinion and judgment solely upon the grounds taken upon the rehearing.

(4.) That while your petitioner is advised and believes that the position taken by the court and upon which it would seem to base entirely its opinion upon the rehearing, is incorrect in law, still your petitioner could not review, after the said rehearing, the opinion of your honorable court, by applying for a writ of error, as it was his purpose to do, until a final judgment for the debt claimed by the plaintiff had been rendered against your petitioner. That after the opinion of your honorable court was certified down to the superior court of Beaufort county, a trial was had in the said court at May term, 1901. That before the said trial your petitioner had made a motion before the said court to be allowed to plead his discharge in bankruptcy. The court denied the motion and your petitioner assigned that as one of the grounds of error upon which he took the appeal heard at February term, 1902. The denial of this motion did not present a Federal question and, therefore, your petitioner, if your honorable court based its decision entirely upon the ground stated in the opinion upon the rehearing, did not desire that this alleged error should be considered at all by your court. That your petitioner is advised that to have insisted, upon the argument in the supreme court, after that court had affirmed the decision below solely upon the ground stated upon the rehearing, and to have asked that the court should still consider the exception relating to the plea in bankruptcy, would have complicated the Federal question, arising upon the affirmance of the judgment below upon the ground taken upon the rehearing, with another question, not Federal, to-wit, the denial of the motion to plead the discharge. This, your petitioner insists, would have defeated the very object he had in view in taking the appeal again to the supreme court, and which he has prosecuted at great trouble and expense. That, as your petitioner has stated in the argument of his counsel, filed at February term, 1902, it was his purpose when your honorable court had affirmed the final judgment rendered against him at May term, 1901, of the superior court of Beaufort county, solely and entirely upon the ground and position taken by your court upon the rehearing, to have applied for a writ of error to the Supreme Court of the United States, to the end that what he believed and was advised was an error in law, presenting a Federal question, not complicated with other questions not Federal, should be reviewed and corrected by the higher court. That your petitioner respectfully insists that, if your honorable court should base its opinion, affirming the final judgment against him below, upon the ground stated upon the rehearing, and which your petitioner then and now believes was the sole ground upon which the court intended to base its opinion upon the rehearing, he had the right to ask the court not to consider any assignment of error relating to the plea of discharge in bankruptcy. That the counsel of petitioner, in his printed argument, at February term, 1902, asked the

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court not to consider the assignment of error relating to the plea in bankruptcy. That it was error for the court to consider it after this request, and it was hurtful and injurious to your petitioner. That the assignment of error, in reference to the refusal of the court below to permit your petitioner to plead his discharge, presented a question which was not Federal and upon which your petitioner was not entitled to a writ of error to the Supreme Court of
78 the United States. That the sole, separate and distinct Federal question upon which your petitioner desired to obtain his writ of error was that raised by the affirmance upon the ground stated in the opinion upon the rehearing of the final judgment rendered against your petitioner in the superior court. The consideration by the court of both the Federal and non-Federal questions defeated your petitioner's writ of error.

(5.) That upon the trial in the superior court, at May term, 1901, the case was tried by his honor Judge O. H. Allen, in conformity with the opinion of the supreme court upon the rehearing. At the close of the evidence the plaintiff asked the court to charge the jury as follows: (1) "That the garnishee judgment in the courts of Maryland, entitled Jacob Epstein against B. Balk and Isaac H. Harris, garnishee, is void, and that any payment by defendant Harris, to Jacob Epstein of the $180 in question was a nullity, and the defendant can not set up any such payment as a defence to this action or as a plea in bar thereto. (2) That if you believe the evidence, the plaintiff is entitled to recover of the defendant, Harris, the sum of $180, with interest."

The following issue was submitted to the jury, and they responded thereto as follows, to wit:

Is the defendant indebted to the plaintiff; and if so, in what amount?

Answer: "One hundred and eighty dollars, with interest on the same from August 11, 1896."

The court charged the jury, that if they believed the evidence in the case they should answer the above issue as above set forth, and that upon all the evidence in the cause plaintiff was entitled to recover of the defendant the sum of $180, with interest from the time the summons in this case was issued, on August 11, 1896.

To this charge the defendant excepted.—Exception 1.

79 The jury responded to the above issue as stated.

Judgment was rendered in favor of the plaintiff and against the defendant, and L. B. Suskin, his surety, and defendant excepted. —(Printed Record at February term, 1902, pages 31–32.)

This charge of the court was a plain and clear denial, as your petitioner contends and is advised, of full faith and credit to the judgment of the Maryland court pleaded and offered in evidence in the courts of this State, and does not accord to that judgment the respect to which it was entitled in the courts of the State of Maryland. That your petitioner is advised that this is a Federal question and would entitle him to a writ of error to the Supreme Court of the United

States, when affirmed by your honorable court upon the ground stated upon the rehearing, provided this Federal question was not complicated by any question not Federal, like the ruling upon the plea of discharge in bankruptcy, on the grounds upon which the original opinion was based at February term, 1898 (122 N. C., 64).

That in order to present this Federal question, and to have the Supreme Court of the United States, upon a writ of error, to pass upon the validity of this Maryland judgment, your petitioner again appealed to the supreme court expecting, desiring and requesting that your honorable court would affirm the judgment below solely upon the ground stated in the opinion upon the rehearing, and requesting that the court should not complicate the Federal question thus raised by considering the error assigned relating to the denial of the motion to plead the discharge in bankruptcy, and should not consider or base its opinion upon either of the grounds stated in the original opinion (122 N. C., 64), and which your petitioner insisted in the argument of his counsel and now insists that the court
80 by strong implication, if not expressly, had abandoned upon the rehearing.

(6.) That after the jury rendered their verdict against your petitioner, at May term, 1902, of the superior court of Beaufort county, he moved for a new trial upon the following grounds, among others, to-wit: "(2) That the judgment of the State of Maryland and all proceedings prior to the said judgment in the case of Jacob Epstein, trading as 'Baltimore Bargain House,' against B. Balk and Isaac H. Harris, garnishee, were in strict conformity to the laws of the State of Maryland relating to attachment and garnishment, and that under the charge of the court to the jury in this cause full faith and credit were denied to the record and judgment in the said case. (3) That the court erred in charging the jury that the judgment of the Maryland court was not a defence and bar to the present action. (4) That the court erred in charging that the judgment of the Maryland court and the satisfaction of that judgment by defendant, Harris, is not a defence and bar of the present action."—(Printed Record, February term, 1902, pages 32–33.)

That your petitioner insists that these three errors assigned upon the motion for a new trial in the superior court, and also assigned as grounds of error upon the appeal to the supreme court, raise and constitute a Federal question and that the decision solely of this question, and upon the sole ground stated in the opinion on the rehearing, would entitle your petitioner to his writ of error. That this is the Federal and only question which your petitioner desired to present or to have considered by your honorable court. That your petitioner, out of abundant caution, as he believed, through his counsel requested the court not to consider the matters relating
81 to the plea of discharge in bankruptcy and not to base its opinion upon either of the grounds stated upon the original hearing, which he understood to be abandoned by the court, and in

doing either of these matters and things the court, as your petitioner insists, has erred and thereby deprived your petitioner of his right to have the opinion of your honorable court reviewed by writ of error. That in its opinion, rendered by the chief justice, the court say: "There is but one point presented in this appeal, if we adhere to our former opinion rendered on the petition to rehear?" That point your petitioner respectfully insists is the very Federal question he desired to present. The court then continued: "But we are now asked to abandon the ground upon which that decision rests, and put the opinion in this appeal upon the ground stated in the first opinion, 'that it may present a Federal question.'" That your petitioner insists, most earnestly, that he did not desire or intend or request that the Federal question should be raised and presented by basing the opinion of the court upon the appeal heard at February term, 1902, upon either of the grounds taken upon the original hearing and abandoned virtually, although not expressly, by the court upon the rehearing. That for the court to have reached that conclusion your petitioner earnestly insists is based upon a misconception by the court of the printed argument of the counsel of the petitioner at February term, 1902, of the supreme court, and the said court erred in so deciding, thereby depriving your petitioner of his right to review said decision by writ of error to the Supreme Court of the United States. That this error and the error relating to the consideration of the plea of discharge in bankruptcy are the two errors which your petitioner assigns in this petition to rehear. That it is not the intent or purpose of this petition to seek a rehearing of the
82 decision of this court rendered at February term, 1899 (122 N. C., 467). That the object and intent of petitioner's appeal was to affirm the final judgment against him in the superior court upon the same ground assigned at February term, 1899, and upon that ground alone, to the end that the naked Federal question of the validity of the Maryland judgment, pleaded in the courts of this State, may be reviewed upon writ of error by the Supreme Court of the United States.

(7.) That the judgment rendered in favor of the plaintiff and against the defendant has been secured. That the judgment for costs, rendered against defendant in favor of the plaintiff, at February term, 1902, of the supreme court, is also secured. That no execution has been issued on the judgment of the superior court against the defendant and his surety. That an execution for costs has been issued upon the judgment of the supreme court at February term, 1902, and the said execution is now in the hands of R. T. Hodges, sheriff of Beaufort county.

Your petitioner asks that the said execution be recalled and that no execution shall be issued upon the judgment of the superior court until the petition to rehear shall have been determined. That both of the said judgments have been and are perfectly secured.

Your petitioner prays that this cause be reheard, and that the

opinion and judgment of the court be corrected in the particulars and respects indicated.

August 8, 1902.

CHAS. F. WARREN,
Attorney for Defendant, Isaac H. Harris.

We, J. W. Hinsdale and Stephen C. Broque, two members of the bar practicing in the supreme court of North Carolina, and
83 who have no interest in the subject-matter of the above action, and who have never been of counsel for either party to the suit, do hereby certify that we have carefully examined the case above and the law bearing upon the same, and the authorities cited in the opinion, and in our judgment and opinion the decision is erroneous in the particulars specified in the foregoing petition to rehear.

JOHN W. HINSDALE.
STEPHEN C. BROQUE.

The clerk of the supreme court is directed to send this petition to rehear to his honor David M. Furches, chief justice of North Carolina.

CHAS. F. WARREN,
Attorney for Defendant.

Order.

BALK
v.
HARRIS. } Petition to Rehear.

I do not see the error pointed out by the learned counsel for the petitioner, as he stated in his brief. "I therefore respectfully request the court to put its decision solely upon the Federal question, and not to complicate it by any question of voluntary payment or other question not Federal, to the end that the decision of this court may be reviewed by the Supreme Court of the United States."

But as the petition presents matter somewhat personal to counsel, I direct a rehearing, that the opinion of the court may be reviewed, when it will be personally constituted (to some extent) different to what it is now. This will be printed with the record, as all orders for rehearings should be. Let the case be reheard.

September 8, 1902.

FURCHES, *C. J.*

Docket entries.—Petition to rehear docketed Sept. 8. 1902—Argued Feb. 3, 1903. Opinion handed down Feb. 24, 1903 as follows:

84 *Petition of Defendant to Rehear.*

(Title of Cause.)

Chas. F. Warren for petitioner;
Small and MacLean, *contra.*

WALKER, *J.*:

This case is again before the court upon a petition to rehear the judgment rendered at February term, 1902. When the case was first here, at February term, 1898, upon appeal of the plaintiff (122 N. C., 64), this court decided that the judgment of the Maryland court in the garnishment proceedings, which was pleaded by the defendant in this suit, as a defense in bar of plaintiff's recovery, could not avail the defendant, because it was valid for two reasons, (1) that the affidavit upon which the writ of garnishment issued was defective, in that it failed to state that the plaintiff, Balk, who was the defendant in that proceeding, had any property in the State of Maryland, and (2) that the payment of the judgment of the Maryland court by Harris, the garnishee, in that suit and the defendant in this suit, was voluntary.

The defendant Harris, at February term 1899 of this court, filed a petition to rehear the judgment rendered at February term, 1898, alleging as error therein, that the grounds upon which this court based its decision against him, were untenable. At said term, the petition to rehear was dismissed, but, to use the language of the court, "for an entirely different reason from that given at the first hearing," and the court gave as its reason for the dismissal of the petition that the situs of the debt garnished was not where the debtor Harris was "found," but where he "resided," and as he and his creditor Balk, resided at the time in this State, the process of garnishment sued out in the Maryland court and the judgment of that court by which the debt of Harris to Balk had been condemned to the payment of the debt of Balk to Epstein was invalid, as the Maryland court had acquired no jurisdiction to render any such judgment. As the first judgment in the court below was in favor of the defendant, Harris, a new trial was ordered and the case was again tried at May term, 1901 of the superior court of Beaufort county and in deference to the opinion of this court, as just stated, the judge who presided at the trial
85 of the case, substantially directed the jury to return a verdict for the plaintiff which was done and a judgment in accordance therewith was entered against the defendant. The defendant, when the case was called for trial in the lower court, moved in that court to be permitted to plead and prove his discharge in bankruptcy, which had been issued to him by the proper court since the last continuance. This motion was refused and defendant excepted. From the judgment against him he appealed to this court and

assigned as errors, the refusal of the court to permit him to plead his discharge in bankruptcy and the instruction in regard to the judgment of the Maryland court in the garnishment proceedings, the defendant contending that the court, by the said instructions to the jury to the effect that the judgment of the Maryland court was invalid for want of jurisdiction in that court to render it and was no defense or bar to this action, denied full faith and credit to the records and proceedings of the Maryland court in the case of Epstein *v.* Balk. The case was again heard in this court upon defendant's appeal at February term, 1902, and the judgment was affirmed. Balk *v.* Harris, 130 N. C., 381.

It appears from the brief of the defendant's counsel filed at said term that he withdrew the assignment of error relating to the discharge in bankruptcy, and that, notwithstanding such withdrawal, the question raised by the said assignment was discussed in the opinion of the court as given by Furches, C. J. and decided against the defendant as was also the other question as to the judgment of the Maryland court. The defendant now asks the court to rehear that judgment, not only upon the ground that the court inadvertently decided a question against him which was not presented for decision, but because the court, as appears in the opinion delivered by Furches, C. J., misconceived the contention of his counsel with reference to the first decision made by this court in the case, and evidently supposed that his counsel wished this court to abandon the ground of decision stated in *teh* opinion of Clark, J. filed at February term, 1899 (124 N. C. 467), and to place its decision upon the grounds set forth in the opinion filed at February term, 1898, (122 N. C., 64), so that a Federal question would clearly be presented, and that this court by reason of said misunderstanding has in some way, not made to appear very plainly to us, im-
86 paired the defendant's right to sue out and successfully prosecute a writ of error from the Supreme Court of the United States to said judgment. The former chief justice, in the opinion given for the court at February term, 1902, (130 N. C., 381, 382) referring to the defendant's supposed objection to the opinion of the court filed at February term, 1899 (124 N. C., 467) uses this language: "This we cannot do without reversing our judgment and adopting arguments in the first opinion (122 N. C., 64) which we have admitted were not tenable and were expressly abandoned in the second opinion." It seems from this language that the court, though it may have misunderstood the argument of defendant's counsel, has said precisely what he desired to be said in the case.

We cannot see how the decision of the court upon the question of the discharge in bankruptcy can in the least degree affect the defendant's right to sue out and prosecute a writ of error to the judgment of this court, or how it can defeat the jurisdiction of the Supreme Court of the United States to review the said judgment, if it otherwise had the jurisdiction by reason of the question involved in this controversy. It is true the court below refused to permit the

discharge to be pleaded, but after doing this, it decided as it was bound to decide before a verdict and judgment could be given for the plaintiff, that the judgment of the Maryland court was invalid and constituted no bar to the plaintiff's recovery. If this decision presented a Federal question, because it was a denial of a right to which the defendant was entitled under article IV sec. 1 of the Constitution of the United States requiring full faith and credit to be given in each State to the public acts and judicial proceedings of every other State, and the act of Congress passed in pursuance thereof, and this the Supreme Court of the United States must decide, that question still remains undiminished and unimpaired, notwithstanding the ruling of the court regarding the discharge in bankruptcy. It is undoubtedly true that when two propositions are presented in a record from a State court, one involving a Federal question and the other not, the Supreme Court of the United States will not assume jurisdiction, provided the latter question is sufficient of itself, notwithstanding the Federal question, to sustain the judgment of the State court. Harrison *v.* Martin, 171 U. S., 38.

87 If the decision of the Federal question is necessary to the decision of the cause and is actually decided adversely to a party claiming a right under the Constitution or laws of the United States, or to state it differently, if the judgment could not have been rendered without deciding the Federal question, the Supreme Court of the United States has jurisdiction by writ of error or appeal according to the nature of the case to review the judgment of the State court and to reverse the same, or to give other adequate relief, if it is erroneous. Murdoch *v.* Memphis, 20 Wall. 590; Cook County *v.* Canal Co., 138 U. S., 636. It is perfectly manifest that the decision of the court below upon the motion of the defendant to be permitted to plead his discharge in bankruptcy did not dispose of the case, and was not sufficient of itself to sustain the verdict and judgment against the defendant.

The remaining question, as to the validity of the judgment of the Maryland court and *if* legal effect as a bar to the plaintiff's recovery, was necessary to the final determination of the case by judgment against the defendant.

In the petition to *read here*, we are not called on *yo* review the former decision of this court with respect to the validity of the Maryland judgment. Indeed, we could not well do so on this rehearing, as the judgment of this court at February term, 1899, (124 N. C. 467) is, as to the defendant in this case, *res judicata*, so that the correctness of that judgment and of the opinion upon which it is based is not now under consideration, and we refrain from expressing any opinion in regard thereto. If there was any error in that decision, the defendant cannot now allege it and have it corrected, nor indeed does he seek to do so. Whatever right he had to a writ of error when that decision was made and was followed afterwards by a final judgment in the court below which was affirmed by this court (130 N. C. 381), is in our opinion still left to him unimpaired

by anything that was said by this court in the opinion filed at February term, 1902. If any error was committed by this court in giving that opinion in the respect indicated in the petition to rehear, it was clearly harmless and need not to be corrected in order to save to the defendant his right to a writ of error. There was substantially no error in that decision in regard to the discharge in bankruptcy.

88 The defendant does not ask this court to correct any error in its judgment, which if corrected would reverse the judgment, but rather seeks to have this court declare and define what was the reason for its decision, in order that the defendant may show that the judgment of the court rested upon the decision of a Federal question adversely to him, and that he is therefore entitled to a writ of error and to a review of the said judgment by the higher court. If it would avail the defendant anything to do so, or serve any useful or practical service, and the opinion and judgment of this court were not already perfectly clear and explicit as to the very point decided, we would not hesitate to grant the prayer of the defendant's petition. The reason for the decision of this court, as distinctly stated by the former chief justice, is to be found in the opinion of Clark, J. filed at Februaru term, 1899 (124 N. C. 467).

It is a well settled principle that this court will not review a ruling of its own or of the court below, which does not injuriously affect the complaining party, even if the ruling was erroneous. Nissen *v.* Mining Co., 104 N. C., 309; Butts *v.* Screws, 95 N. C. 215; Clark's Code (3rd ed.) p. 771. The alleged error in such a case becomes immaterial. But in this case we now hold that the decision in regard to the merits of the defendant's motion to plead his discharge in bankruptcy was correct, and the court was merely inadvertent to the fact that the defendant's counsel in his brief had withdrawn the assignment of error relating to that question.

As we do not see that the defendant can be prejudiced by the ruling as to the discharge in bankruptcy, and as his condition, in respect to his right to review the judgment of this court by writ of error, is no worse by reason of the decision of that question than it would have been if the matter had not been passed upon, and as the defendant has therefore shown no necessity for granting to him the relief prayed for, we must refuse to allow the petition to rehear.

Per curiam: Petition dismissed.

89 *Judgment, February Term*, 1903.

(Title of Cause.)

This cause came on to be argued upon the petition to rehear the appeal from the superior court of Beaufort county—upon consideration whereof, this court is of opinion that there is no error in the former ruling of this court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable P. D. Walker justice, be certified to the said superior court, to the intent that the petition be dismissed.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred, to-wit, the sum of sixteen 20/100 dollars ($16.20), and execution issue therefor.

[Seal of the Supreme Court of the State of North Carolina.]

90 Supreme Court of North Carolina.

I, Thomas S. Kenan, clerk of the supreme court of North Carolina do hereby certify the foregoing to be a full, true and correct copy of the record on file in this court in the case of B. Balk *v.* Isaac H. Harris.

Given under my hand and seal of said court at office in Raleigh on this the first day of February, 1904.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 19,239. North Carolina supreme court. Term No. 191. Isaac H. Harris, plaintiff in error, *vs.* B. Balk. Filed February 13", 1904. File No. 19,239.

(19,239.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 191.

ISAAC H. HARRIS, PLAINTIFF IN ERROR,

vs.

B. BALK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE W. S. MUSGRAVE,
SYLVAN HAYES LAUCHHEIMER, } *Attorneys.*

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904.

No. 191.

ISAAC H. HARRIS, Plaintiff in Error,
vs.
B. BALK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

The facts concerned in this controversy are plain and unhampered by complications. Jacob Epstein, a resident of Baltimore, Maryland, and trading as the BALTIMORE BARGAIN HOUSE, was a creditor of one B. Balk, a merchant doing business at Washington, North Carolina, in the sum of $344.24 for goods sold to said Balk. During the year 1896 Balk failed. Epstein, being unable to collect the amount owing by Balk, and finding one Isaac H. Harris, also a merchant of Washington, North Carolina, and a debtor of Balk's, in the City of Baltimore, on August 6, 1896, caused to be issued out of the Superior Court of Baltimore City a foreign, or non-resident, attachment against the said Balk, which attachment the Sheriff of Baltimore City laid in the hands of the said Harris and *personally* served him with a summons to appear in the said Superior Court of Baltimore City at the next return day, the second Monday in August, 1896, and answer the said attachment as garnishee. Harris, in obedience to the writ of summons so served upon him, appeared by counsel in the said Court in said cause, and being then indebted to the defendant Balk in the sum of $180, filed his answer admitting the same in due form as provided by the attachment laws of the State of Maryland, after which the said Superior Court of Baltimore City, in due course and as provided by law, rendered

judgment against the said Harris for the sum so admitted. Harris had purchased a quantity of merchandise in Baltimore, and in order to prevent the seizure of the same under execution he made arrangements to pay, and did pay to one of Epstein's counsel, the amount of the judgment thus rendered against him. On August 11, 1896, Balk brought a suit against Harris before a justice of the peace at Washington, North Carolina, to recover the said sum of $180, which action Harris removed to another magistrate on August 14, 1896 (Record, pp. 5-6), before whom the case was tried, and who, on September 2, 1896, gave judgment in favor of Balk, although Harris had pleaded the Maryland judgment in bar. (Record, pp. 7, 8, 9, 29, 30, 31, 32.) Harris took an appeal from the decision of the justice of the peace to the Superior Court of Beaufort County, North Carolina, which was heard at the Fall Term, 1896, of said Court, and, upon the same plea, resulted in a judgment in his favor, reversing the magistrate. On December 9, 1896, Balk took an appeal to the Supreme Court of North Carolina, where on May 4, 1898, the lower Court was reversed and the cause remanded, on the grounds that the affidavit in the Maryland proceedings was defective in not averring that Balk had property in that State and because the payment of the judgment was voluntary. Harris, on November 9, 1898, filed a petition to rehear, which was allowed by the Supreme Court of North Carolina, and after reargument the Court filed an opinion on April 18, 1899, adhering to its former ruling, but abandoning as untenable the two reasons stated in its former opinion, and basing its opinion upon a reason differing entirely from those first expressed, to wit, the *situs* of the debt. The case was then tried again in the Superior Court of Beaufort County, North Carolina, at the May Term, 1901, beginning on May 28, 1901, and judgment was given against Harris, who, on August 19, 1901, appealed to the Supreme Court of North Carolina, where the lower Court was finally affirmed on June 17, 1902. (Record, pp. 15 to 25 and 45 to 53.) Owing to a misunderstanding, a portion of this last-mentioned opinion treated of matters which had been expressly waived and abandoned by counsel for Harris, and in order to correct this misunderstanding and clear the record another petition to rehear was filed on September 8, 1902 (Record, p. 53), which the Court recognized, and in its opinion filed February 24, 1903 (Record, p. 60), so expressed itself as to eliminate all possible complications, leaving the case standing squarely upon the

Federal question, which had been expressly raised and been decided adversely to Harris, the judgment being made final on appeal by the Supreme Court of North Carolina on June 17, 1902. On May 26, 1903, Harris filed in the Supreme Court of North Carolina a petition for writ of error, which was duly allowed, and the case has been brought in due course to the attention of this, the Supreme Court of the United States.

The amount of money involved in the controversy is insignificant, but the legal question is of considerable importance to the mercantile and business world, and is fraught with much interest when viewed in the light of the conflicting decisions of the Appellate Courts of the several States, which makes it desirable to have the law settled beyond peradventure.

Assignment of Errors.

That the point relied upon by the plaintiff in error throughout this litigation has been that certain proceedings had in the Superior Court of Baltimore City, wherein a judgment was rendered against the plaintiff in error at the suit of Jacob Epstein, form a complete bar to the action of the said B. Balk, the defendant in error, for the recovery of the sum in controversy, the said proceedings having been conducted and judgment rendered in strict accordance with the laws of the State of Maryland.

That although the plaintiff in error filed as evidence in his behalf a full and complete copy of the record of the said proceedings in said Superior Court of Baltimore City, duly exemplified, and introduced the statute law of the State of Maryland, showing that the said proceedings were conducted and judgment rendered in exact conformity with the laws and practice of the said State of Maryland, yet the said Supreme Court of North Carolina, in rendering the judgments complained of, failed to give full faith and credit to the proceedings certified by the said Maryland Court, and said decisions are against the title, right, privilege or immunity specially set apart and claimed by the plaintiff in error under Article IV, Section 1, of the Constitution of the United States, and that the question of the recognition of the official acts of the Maryland Court, as is shown by the record, arose directly as well as by clear and necessary intendment, so that said Court erred in giving judgment in the manner and form set forth in the record and herein complained of.

Points and Authorities.

The only question presented for consideration is whether or not the North Carolina Court gave to the proceedings of the Maryland Court that full faith and credit to which the same are entitled under the first section of Article IV of the Constitution of the United States.

It might at first appear, from an examination of the authorities, owing to the diversity of opinion upon the subject, that the question is somewhat confused and not free from doubt, but an analysis of each case and a careful assorting of the authorities make it manifest that the position of the plaintiff in error is wholly tenable, and it can be safely concluded that the question is now settled by preponderance of cases adjudicated by eminent jurists and sustained by learned text writers.

The first question to be considered, and the pivotal point upon which the whole fabric of the case hangs, is whether the judgment rendered by the Superior Court of Baltimore City in favor of Epstein against Harris is a good and valid judgment according to the laws and practice of Maryland, and if this be true, then the judgment must, by the constitutional provision, be accorded due recognition in the Courts of all other States.

For the purpose of convenience in determining this question, it is proper to dissect the whole course of procedure in the attachment case in the Superior Court of Baltimore City, and lay it piece by piece beside the laws of Maryland governing attachments, and by comparison ascertain whether or not the said proceedings were conducted, so far as the statute law is concerned, with that regularity necessary to enable the Court to acquire jurisdiction, and whether the judgment rendered therein is valid under said laws.

In Hodge & McLane on Attachment, Sec. 11 (a Maryland text-book), it is said: "It has been uniformly held in Maryland that the proceeding by attachment is a special one, only authorized by statute, and therefore the jurisdiction conferred upon the Courts is a special and limited one, distinct from and not embraced in their general jurisdiction, and that it must appear affirmatively upon the face of the proceedings that the requirements of the statute have been substantially complied with, otherwise the Court would be acting without jurisdiction and the proceedings would be void."

The attachment laws of Maryland are codified in Article IX

of the Code of Public General Laws, and so much of each section as is applicable will be quoted in full and the corresponding portions of the proceedings in question compared therewith, in order to show whether the statutory requirements were complied with, literally or substantially.

"SEC. 1. Every person and body corporate that has the right to become a plaintiff in any action or proceeding before any judicial tribunal in this State shall have the right to become a plaintiff in an attachment against a non-resident of this State or against a person absconding."

Therefore, Jacob Epstein, a merchant and resident of Baltimore, had the unquestionable right to become the plaintiff in the attachment case.

"SEC. 2. Every person who doth not reside in this State, and every person who absconds, may be a defendant in an attachment; and every corporation * * * "

That B. Balk, the defendant in attachment, was not a resident of Maryland is a concessum in the case, so that he was a proper defendant under this section.

"SEC. 4. No attachment shall issue unless there be an affidavit that the debtor is *bona fide* indebted to the creditor in the sum of ——— over and above all discounts; and at the time of making the affidavit the creditor shall produce the bond, account or other evidences of debt by which the debtor is so indebted; and shall also make affidavit that he knows, or is credibly informed and verily believes, that the said debtor is not a resident of this State, and that he doth not reside therein; * * * "

The affidavit upon which the attachment issued will be found on pages 10 and 33 of the Record, an inspection of which shows that it is literally in the language of the statute. The account, which was produced and filed with the affidavit, is set forth at length on pages 33 to 40, inclusive.

"SEC. 5. * * * The affidavit may be made before the Clerk of the Court from which the attachment shall issue."

The affidavit shows that it was made before Robert Ogle, Clerk of the Superior Court of Baltimore City, from which the attachment issued. (Record, pp. 10, 11, 33, 41.)

"SEC. 7. The affidavit * * * may be made by the creditor, or one of them * * *, or by an agent of the creditor * * *."

The affidavit shows that it was made by Jacob Epstein, the creditor. (Record, pp. 10-33.)

"SEC. 8. Upon making the affidavit and producing the proofs

before the Clerk of the Court from which the attachment is to issue * * * he shall issue an attachment against the lands, tenements, goods, chattels and credits of said debtor."

The affidavit was so made, the account filed and the attachment was issued by the Clerk in due form. (Record, pp. 11-41.)

"SEC. 9. There shall be issued with every attachment a writ of summons against the defendant, and a declaration or short note, expressing the plaintiff's cause of action, shall be filed, and a copy thereof shall be sent with the writ to be set up at the courthouse door by the Sheriff or other officer."

The writ of summons was duly issued (Record, pp. 11-42), and the declaration, or short note, declaring on the common counts in assumpsit, was filed (Record, pp. 12-42), and a copy was duly set up at the courthouse door, as shown by the Sheriff's return. (Record, pp. 12-42.)

"SEC. 10. Any kind of property or credits belonging to the defendant, in the plaintiff's own hands, *or in the hands of anyone else*, may be attached; and credits may be attached which shall not then be due."

The credit of the defendant Balk, to wit, the indebtedness due him by Harris, the garnishee, was attached in the hands of Harris in the jurisdiction, by the laying of the attachment by the Sheriff of Baltimore City in the hands of the said Harris, who was personally summoned to appear and answer the attachment, as shown in the Sheriff's return. (Record, pp. 12-43.)

Thus having demonstrated, by actual comparison, that the proceedings in the attachment were in every particular in conformity with the statute law of Maryland, by which jurisdiction in such cases is obtained by the Courts of that State, let next be examined the statutes concerning the duties and liabilities of the garnishee over whom the Court has thus acquired jurisdiction.

Article IX of the Code of Public General Laws of Maryland further provides:

"SEC. 11. Every attachment issued under the preceding sections shall contain a clause commanding the Sheriff or other officer, at the time of executing the said attachment, to make known to each person in whose hands or possession the lands, tenements, goods, chattels and credits so attached are, if to him it shall seem meet, to be and appear on the return of such attachment before the Court out of which it is issued, to show cause why such lands, tenements, goods, chattels or credits so attached should not be condemned and execution thereof had and made as

in other cases of recoveries and judgments given in courts of record.

"SEC. 12. If neither the defendant nor the garnishee, in whose hands the property or credits may be attached, shall appear at the return of the attachment, the Court shall and may condemn the property and credits so attached, as provided in Section 13, and award execution thereof; provided that no such execution shall issue unless the plaintiff give bond or sufficient security before the Court awarding the execution, to make restitution of the lands, tenements, goods, chattels or credits so as aforesaid condemned, or the value thereof, if the defendant shall at any time within a year and a day—to be accounted from the return of said attachment—appear to the said original action and make it appear that the claim of the said plaintiff, or some part thereof, is not due to the said plaintiff.

"SEC. 13. No sheriff, or other officer, shall levy by way of execution against the garnishee more than the plaintiff's debt and costs, nor more than what the plaintiff shall make appear to be the value of the property and credits attached in the hands of such garnishee, together with such costs only as the garnishee shall put the plaintiff to by denying himself to be indebted to the defendant, and contesting the same, and upon any judgment of condemnation *nisi* against any garnishee for want of appearance or plea, the plaintiff shall be at liberty to proceed and prove his case in the same manner as in any judgment by default *ex parte*, and not otherwise, by proof of his debt, and also the amount of the assets of the defendant in the hands of the garnishee properly subject to attachment; and no judgment of condemnation *nisi* shall be made absolute without such proof; provided that in all cases in which a garnishee has been summoned, at any time after the return of the writ, the plaintiff may file interrogatories in the cause, which shall be served by the sheriff upon the garnishee within 10 days thereafter; or, *if the garnishee shall be a non-resident of this State*, shall be served upon the garnishee by some person to be appointed by the Court in which the case is pending; and if the garnishee shall fail to answer said interrogatories within 20 days after the service of the interrogatories upon him, the plaintiff shall be entitled to judgment against the garnishee for the amount of the claim of the plaintiff for which the attachment was issued."

According to the Maryland laws, in what position did Harris find himself when the Sheriff of Baltimore City served the at-

tachment upon him? He owed Balk $180. If he ignored the summons and refused to answer interrogatories which could have been served upon him, he was threatened with a judgment against him for the entire amount of Epstein's claim. (Sec. 13, *supra.*) If he appeared and contested the attachment in any way, he was liable to be mulcted in costs. (Sec. 13.) And in either event, upon a judgment being rendered against him, his goods which he had purchased, and was continually purchasing, in the Baltimore market, were liable to seizure under execution at any time that Epstein chose to have one issued; or could not Epstein have sued him upon that judgment in North Carolina? There appeared to be, and as a matter of fact was, no rational course left open to him but to appear, answer the attachment by admitting the amount of his indebtedness to Balk and pay the judgment rendered against him, which both relieved him of the costs of the attachment and his goods from the danger of an execution. This course he adopted as the proper one, and he filed, through counsel, his admission of assets (Record, pp. 13-43), after which the Court rendered judgment in due form. (Record, pp. 14-44.)

A garnishee has the right to appear to the action, confess judgment to the amount in his hands and have his costs allowed.

Cockey *v.* Leister, 12 Md., 124.

Judgments *in personam* are binding upon persons living beyond the limits of the State of Maryland, where they *voluntarily appear* and answer the suit, or have been *duly served with process.*

Garner *v.* Garner, 56 Md., 127.

"The Code provides that 'any kind of property or credits belonging to the defendant, in the plaintiff's own hands, *or in the hands of anyone else,* may be attached.' * * * Where money or credits are attached, the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee * * * and the *judgment is a personal judgment against the garnishee.*"

Buschman *v.* Hanna, 72 Md., 1-5-6.

The Maryland Code, Art. IX, Sec. 34, provides that any judgment of condemnation against a garnishee and execution thereon, *or payment by such garnishee, is pleadable in bar* to any

action brought against him by the defendant in the attachment for or concerning the property or credits so condemned.

The plaintiff in error maintains, therefore, that so far as the Maryland Court is concerned, having acquired jurisdiction by virtue of personal service of process upon him within the State, the judgment so rendered against him, when measured by the laws, practice and decisions of the State of Maryland, was in every respect valid; hence it was error on the part of the North Carolina Court to refuse to award it full faith and credit when offered in his defense. The Superior Court of Beaufort County, North Carolina, held this view until reversed by the Supreme Court of North Carolina (Record, p. 15). The first opinion of the Supreme Court was based upon the failure of the affidavit to aver that the defendant, Balk, had property within the State of Maryland, and also upon an alleged voluntary payment. As no such averment is required by the laws of Maryland, the position taken was clearly erroneous, as obviously was that on the second point, which the Court frankly admitted, and having entirely abandoned those grounds, the first opinion is merely incidentally referred to. The second opinion (Record, p. 23), which was handed down after reargument, takes the position that the reversal of the lower Court is adhered to, but "for an entirely different reason from that given on the first hearing," that is, the *situs* of the debt, declaring that the *situs* was with Balk.

As to the question of the *situs* of a debt, there has been much controversy and a great diversity of opinion, but the weight of authority favors a position different from that taken by the Supreme Court of North Carolina in this case.

A debt is something which (in the absence of some written evidence) exists only in contemplation of law. It is merely the right one person has to ask or demand of another a certain amount of money or other property; an incorporeal right, invisible, intangible and without substantive existence.

Situs means the site or locality of something. In the usual acceptation of the word it must of necessity relate to something which has actual physical and substantial existence; so it would be apparently stretching even legal fiction to an unreasonable extent to attempt to give something which has no substantial

existence a substantial location, except when compelled for purposes of administration or taxation.

The person to whom the debt is due may ask or demand payment of his debtor at any place where his debtor may be found, and may sue thereon and recover judgment therefor in the courts of any State in this country where his debtor may be, temporarily or otherwise, provided, of course, the debtor is regularly served with process within the jurisdiction.

If, therefore, a debt has a *situs* at all, it exists, for the purposes of garnishment, at any place where the debtor may be or where a suit could be maintained against him by his creditor. There a creditor of his creditor may, by substituting himself for the creditor, sue and recover the debt due by the debtor thus garnished with the same facility that the creditor could so sue and recover.

The plaintiff in error contends, however, that no consideration of the *situs* of the debt should be entertained in this case whatever, for, as has been explained, the *real* question is whether or not there was a valid judgment rendered *in personam* against him by the Maryland Court; if so, it is good everywhere, and he can plead it successfully in bar of the action of Balk regardless of the question of the *situs* of the debt.

Inasmuch as the *situs* of the debt has figured conspicuously in this case, the law with reference thereto is worthy of consideration.

Many able, interesting and conflicting, as well as instructive, discussions of the subject appear in the reports and text-books, and even if it be conceded that the *situs* of the debt is an important consideration in this case, still the best authority sustains the position of the plaintiff in error.

The latest text-book treating of the subject is Minor on Conflict of Laws (1903), in which the author discusses the question with much ability and sums up the various theories regarding the *situs* of debt, and after pointing out with great clearness the fallacies of those theories he condemns and his reasons therefor, concludes as his opinion, supported by a large and distinguished array of authority, that the correct rule is that "*the situs of a debt for the purposes of garnishment is not only at the domicile of the debtor, but in any State in which the garnishee may be found, provided the municipal law of the State permits the debtor to be garnished, and provided the Court acquires juris-*

diction over the garnishee through his voluntary appearance, or by actual service of process upon him within the State."

Minor on Conflict of Laws, Section 125.

This is supported by a long line of cases, the most important of which are the following:

Chicago, Rock Island & Pacific Railroad *v.* Sturm, 174 U. S., 710.
Tootle *v.* Coleman, 46 C. C. A., 132; 107 Fed., 41.
Mooney *v.* Buford Mfg. Co., 72 Fed., 32.
Morgan *v.* Neville, 74 Pa. St., 52.
Savin *v.* Bond, 57 Md., 228.
National Insurance Co. *v.* Chambers, 53 N. J. Eq., 468.
Harvey *v.* Railroad, 50 Minn., 405.
Wyeth *v.* Lang, 127 Mo., 242.
Lancashire Insurance Co. *v.* Corbetts, 165 Ill., 592.
Embree *v.* Hanna, 5 Johns., 101.
C., B. & Q. Ry. *v.* Moore, 31 Neb., 629.
Hull *v.* Blake, 13 Mass., 153.
Blake *v.* Williams, 6 Pick., 286.
Harwell *v.* Sharp, 85 Ga., 124.
Neufelder *v.* Ins. Co., 6 Wash., 341.
Mooney *v.* R. R., 60 Iowa, 346.
Howland *v.* R. R., 134 Mo., 474.
R. R. *v.* Thompson, 31 Kans., 180.
R. R. *v.* Crane, 102 Ill., 249.
Fithian *v.* R. R., 31 Pa. St., 114.
Wabash *v.* Dougan, 142 Ill., 248.
Berry *v.* Davis, 77 Texas, 191.
Nichols *v.* Hooper, 61 Vt., 295.
Samuel *v.* Agnew, 80 Ill., 553.
Richardson *v.* Lester, 83 Ill., 55.
B. & O. S. W. Ry. *v.* Adams, 60 L. R. A., 396.
Campbell *v.* Home Ins. Co., 1 S. C. N. S., 158.
Glover *v.* Wells, 40 Ill. App., 350.
Roche *v.* Ins. Co., 2 Ill. App., 360.
Moore *v.* C., R. I. & P. Ry., 43 Iowa, 385.
Cochran *v.* Fitch, 1 Sandf., Ch. 142; 7 L. Ed., 272.
Mahany *v.* Kephart, 15 W. Va., 609.
Holland *v.* M. & O. Ry., 84 Tenn., 414.
Pomeroy *v.* Rand, McNally & Co., 157 Ill., 176.
Cole *v.* Fliteraft, 47 Md., 312.

Bank *v.* Merchants' Bank, 7 Gill (Md.), 415.
Brengle *v.* McClellan, 7 G. & J. (Md.), 434.
Newland *v.* Reilly, 85 Mich., 151.
Felt Mill *v.* Blanding, 17 R. I., 297.
Cohoon *v.* Morgan, 38 Vt., 236.
Black on Judgments, Secs. 593, 857, 859 and 923.
Rood on Garnishment, Secs. 242-5.

In Rood on Garnishment is found a valuable consideration of the subject, and from which (Secs. 242-5) the following is extracted:

"For most purposes—taxation, etc.—it has long been a recognized and established fiction of law that their *situs* is at the domicile of the owner. It would seem important to remark that this is fiction merely, and that it is impossible, from the nature of things, for intangible property to have an actual location were it not for the fact that some Courts and text writers have at times appeared oblivious of it. Though it is not discussed in the opinion, Chancellor Kent, as early as 1809, seemed to have taken it for granted that this fiction does not apply to debts, when they are sought to be reached by garnishment, when the owner does not reside in the jurisdiction where the action is. (Embree *v.* Hanna, 5 Johns., 101.) And the same doctrine has been recognized and applied tacitly, or positively and directly asserted in almost all of the courts of last resort in America since that time. * * * In its essential elements a garnishment suit is a suit brought by the principal defendant against the garnishee in the name and for the benefit of the plaintiff. The plaintiff is empowered by law to step into the shoes of the garnishee's creditor and acquire his rights; no more, no less. Whatever he could do, the plaintiff, under the statutory novation of garnishment, may do as his assignee and attorney-in-fact by operation of law. *Wherever the garnishee could be sued by the defendant for the demand, he may be charged as garnishee on account of it. Other States must recognize this right if they recognize garnishment at all.* * * * The *situs* of property for the purpose of jurisdiction is one thing, and its *situs* for the purpose of determining the rights of the parties thereto is another, and the two are not necessarily the same. * * * Whatever rule each State may choose to adopt to regulate proceedings in garnishments brought in their respective jurisdictions, this is the only correct rule to determine the question when it is sought to collect a second time

from one who has been charged as garnishee in a foreign jurisdiction. The garnishee is helpless and at the mercy of the Court that charged him as such. What has he done that he should be placed upon the rack by the contending Courts and stretched both ways?"

A number of the cases cited are pronounced in supporting this line of reasoning, the most important of which is the case of C., R. I. & P. Ry. *v.* Sturm, 174 U. S., 710, to which a more extended reference will be made hereafter.

In the case of Tootle *v.* Coleman, 46 C. C. A., 132, the Court say: "The ground of objection is that the *situs* of the choses in action attached by the garnishment was in St. Joseph, Missouri, where the debts were contracted and were payable, and where the contractors resided; and the argument is that the choses in action could not be attached where they were not located. This theory has received the sanction of the Supreme Court of Kansas in Missouri Pacific Railway *v.* Sharritt, 43 Kans., 375, and the condemnation of the Supreme Court of the United States in C., R. I. & P. Ry. *v.* Sturn., 174 U. S., 710, in which the Kansas case was reviewed and disapproved. * * * It (the decision in Railway *v.* Sturm) is not only decisive of the issue in this case, but is in accord with reason, with the great weight of authority and with the general understanding and practice of the profession. * * * Our conclusion is that the right to garnish a debtor is not limited to the *situs* of the chose in action, and a garnishment by a citizen of one State of a debtor of the same State, whose creditor resides, whose debt was contracted and is payable in another State, is such an attachment of the chose in action as will authorize the Court to obtain jurisdiction to dispose of it by publication of the summons against the defendant."

In the case of Morgan *v.* Neville, 74 Pa. St., 52, *all* the parties, the plaintiff, defendant and garnishee, were non-residents of the State of Maryland, where the attachment was sued out, and the Court held that the plaintiff had the same right to serve the garnishment upon the garnishee as would a citizen of Maryland have had, had he found him in the jurisdiction. The laws of Maryland, recognizing the constitutional right, are exceedingly liberal in respect to non-residents, and any person may be a plaintiff in an attachment suit, irrespective of whether he be a resident of the State or not. This is expressly decided in Hodgson *v.* Southern B. & L. Assn., 91 Md., 439, and Mason *v.* Union Mills, 81 Md., 446.

In Wyeth *v.* Lang, 127 Mo., 242-247, the Court held that "service by publication only upon a non-resident may be sufficient to sustain garnishment of his debtor, although the indebtedness is by its terms payable at the residence of the non-resident. *A debt may be garnished at any place where suit may be brought by the creditor if the laws of the place authorize it.*"

In Lancashire Insurance Co. *v.* Corbetts, 165 Ill., 592, the Court say: "The jurisdiction of garnishment of a debt is not determined by the *situs* of the debt, *but by the liability of the garnishee to be sued therein.* A judgment against a garnishee, rendered without fraud or collusion, after full disclosure of a prior garnishment in a Court of another State having collateral jurisdiction, must, after it has been satisfied, be held a complete bar to the proceeding in the other State. * * * Some Courts seem to hold the doctrine that, where there is no personal service of process on the principal defendant, the proceedings must be instituted in the jurisdiction where the debt had its *situs* (that is, the domicile of the principal defendant). We are satisfied that the weight of modern authority is otherwise."

In Harvey *v.* Great Northern Railway, 50 Minn., 405-6-7, the Court held: "*For the purpose of attachment a debt has a situs wherever the debtor can be found. Wherever the creditor might sue for its recovery, there it may be attached as his property,* provided the laws of the forum authorize it. Neither is it material that the debt was not made payable in the State where the attachment proceedings are instituted. *The pending of a prior attachment in another State, which binds the debt, may be set up by way of defense to a suit by the defendant in attachment to recover the same debt.*"

In Embree *v.* Hanna, 5 Johns., 101, Chief Justice Kent held that the attachment in that case — which was also sued out in Maryland—was pleadable in abatement to the suit instituted in New York by the defendants against the garnishee.

In C., B. & Q. Ry. *v.* Moore, 31 Neb., 629, the Court says: "The judgment in the garnishment suit set up by the plaintiff in error, being valid and binding upon the parties thereto in the State where rendered, is entitled to full faith and credit in this State."

Black on Judgments, Sec. 859: "The true doctrine is that a judgment is to receive in all Courts the same faith, credit and respect that is accorded to it at home."

Ibid., Sec. 593: "It is universally agreed that when a judgment is recovered against a garnishee by an attaching creditor

and paid, such judgment may be pleaded by the garnishee in bar of any action against him for the same debt brought by the principal defendant."

Ibid., Sec. 853: "The judgment of a foreign Court of competent jurisdiction in a proceeding in the nature of a garnishment is binding and conclusive, and affords a complete protection to the garnishee, and the money paid under it cannot be recovered back by the original owner of the debt in another country."

As to the conclusive effect of judgments of sister States, see *Ibid.*, Secs. 857-9 and 923.

The rule is that the rights of a garnishee are to be carefully protected. He is not to be placed in a situation, except from his own negligence, where he will be compelled to pay the debt twice.

Burton *v.* District Township, 11 Iowa, 169.

In the case of Morgan *v.* Neville, 74 Pa. St., 52, the lower Court took somewhat the same view of the case as did the Supreme Court of North Carolina in the case at bar, and the facts being similar, with the single exception that Epstein resided in Maryland (which tends to strengthen the case if it has any effect at all), it is interesting to consider the opinion of the Supreme Court of Pennsylvania in reversing the lower Court.

Page 56: "Agnew, J.—This action in the Court below was for the wages of labor performed by George Neville for William Morgan, a contractor upon the Sand Patch Tunnel in Somerset county. Morgan set up a payment made by him as garnishee of Neville, in an attachment issued by a justice of the peace of Allegheny county, Maryland, in favor of one Michael Shannon, served on Morgan in Maryland, and judgment against him by default. All the parties were residents of Somerset county, Pennsylvania, but there was no evidence of collusion or combination between Shannon and Morgan to evade the Pennsylvania statute as to the wages of labor by going into Maryland for the purpose of having the attachment executed. We must, therefore, assume that the Maryland proceeding was *bona fide*. The Court below held that because Neville, the plaintiff below, was not in Maryland and was not served with notice, he was not affected by the judgment in the attachment, and that the Maryland Court ought to have enforced the Pennsylvania Act exempting the wages of labor from execution. In both of these respects the learned judge fell into error. Upon the first point the judge seems to have misapplied the doctrine of Smith *v.* Steel, 7 S. & W., 447,

which decided that a judgment *in personam* in a foreign attachment against a vessel under the civil code of Louisiana was not binding, and would not be enforced in Pennsylvania, and that the Louisiana Court not having jurisdiction of the person of the defendant, the record was not within the protection of the first section of the Article of the Constitution of the United States, requiring full faith and credit to be given in such State to the public acts, records and judicial proceedings of every other State. But Steel *v.* Smith concedes jurisdiction in the attachment over the property of the defendant within the State of Louisiana, and this is the only feature in that case applicable to this, the defendant below claiming credit only for the money paid by him under the Maryland attachment. There being no collusion, Shannon, though a citizen of Pennsylvania, had a right to sue out his attachment in Maryland. He falls within the words and the spirit of the first clause of the second section of the fourth Article of the Constitution of the United States, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. One of these is the right to institute actions of any kind in the Courts of another State (Corfield *v.* Coryell, 4 W. C. C. R., 380, 1). Shannon went into Maryland, a right he had under that clause, and there made the affidavit required by the Maryland statute and sued out his attachment. So far, then, the magistrate had jurisdiction. The attachment was served personally on Morgan, the debtor of Neville, when found in Maryland. A citizen of Maryland would have an undoubted right to serve his attachment on Morgan, had he found him there, in order to secure his debt against Neville; and he having this right, Shannon has the same right under the Constitution of the United States. The debt to Neville was therefore legally attached, and the jurisdiction of the Maryland justice's court vested fully without notice of the writ to Neville. In foreign attachment (and this proceeding is in the nature of a foreign attachment) notice is not given to the defendant by service of the process, for the valid reason that he cannot be served, and service on his property or on his debtor is all that can be had, in the nature of the thing. The garnishee must give notice to his own creditor if he would protect himself, and this he did, in this instance, the next morning, as he proved by himself and Neville. The Maryland tribunal having jurisdiction, it was not error to disregard the Pennsylvania Act exempting the wages of labor from attachment in the hands

of the employer. * * * (Page 58.) It is contended here that the record of the judgment is defective in showing no judgment against the defendant or the garnishee, but only a judgment of condemnation against the property or debt. But the judgment is a judgment *in rem*, and, therefore, against the property or debt, and according to the 13th section of the Maryland Code, which says, if neither the defendant nor garnishee in whose hands the property or credits may be attached shall appear, at the return-day of the attachment, the Court may condemn the property and credits so attached and award execution thereof. And by the 37th section the judgment of condemnation is made pleadable in bar in any after-action brought against the garnishee by the defendant. * * * "

(*Note by Counsel.*—The posting of notices in three places mentioned in the latter part of the foregoing opinion does not pertain to Court attachments, but has special reference to proceedings before a justice of the peace, with which we are not concerned in this case. Code of Maryland, Art. LII, Sec. 41.)

In this case the Court treats the judgment as a judgment *in rem*, through a manifest misapprehension of the Maryland laws, as heretofore shown, but to show more clearly that such judgment is regarded in Maryland as a judgment *in personam* the following quotations are taken from Hodge & McLane on Attachment:

SEC. 184. " * * * If the judgment of condemnation be against funds or credits in the hands of a garnishee, it is a judgment *in personam* against such garnishee. * * * There is no distinction, as to their force and legal effect, between a judgment of condemnation in attachment, where the requisitions of the attachment laws have been complied with, and a judgment *in personam*. Thus, in an action of debt on a bond of indemnity, conditioned to save the plaintiff harmless for paying a debt due by the plaintiff to A, where the plea was *non damnificatus*, a replication setting forth an attachment and condemnation against the plaintiff was held good on demurrer. Gordon *v.* Mayor and City Council, 5 Gill, 242; Taylor *v.* Phelps, 1 Harris & Gill, 492; Brooke *v.* Macnemera, 1 Harris & McHenry, 80."

SEC. 189. "With regard to the force and legal effect to be attributed to a domestic judgment pronounced by a Court of competent jurisdiction, there is no distinction between a judgment of condemnation rendered in an attachment, in a case

where the requisitions of the attachment laws have been complied with, and a judgment *in personam*. They stand upon the same principle; they both import absolute verity; are equally conclusive with respect to the subject-matter adjudicated, and cannot be re-examined or impeached in any collateral proceeding. And so where, in proceedings in attachment, there was nothing to show that the garnishee made any defense whatever, but assented to the judgments of condemnation, those judgments, like others pronounced by Courts of competent jurisdiction, must be respected as final and conclusive on the rights ascertained and established by them. Barney *v.* Patterson, 6 Harris & Johnson, 202; Peters *v.* League, 13 Md., 58; Henkelman *v.* Smith, 42 Md., 164; Groome *v.* Lewis, 23 Md., 137."

SEC. 192. "The judgment of condemnation in attachments is not for the delivery of specific property to the plaintiff, but the lands or goods are condemned and rendered liable to execution and sale. When final judgment of condemnation is recovered, either *in rem* against the property specifically attached or *in personam* against the garnishee, the sheriff does not proceed under the attachment, but a writ of *fieri facias* must be issued, and under this writ the sheriff either sells the property actually condemned, *or proceeds in the ordinary way to levy upon the property of the garnishee.*"

As bearing with great importance upon the whole case, the opinion of the Court of Appeals of Maryland in Savin *v.* Bond, 57 Md., 228, is relied upon with much confidence by the plaintiff in error. Beginning on page 229, the Court say:

"The facts of this case are as follows: Savin, the appellant, distrained the goods of John Bond for rent; Bond sued out a writ of replevin from a justice of the peace, and executed a replevin bond with J. Jesse Moore as surety in the penal sum of $150. The justice of the peace rendered a judgment in the replevin suit in favor of Bond, the plaintiff; Savin appealed, and the Circuit Court for Washington County reversed the judgment of the justice of the peace and rendered a judgment in favor of Savin, *de retorno habendo* of the property, valued at $75 and costs. On the 17th of September, 1877, Savin, the appellant, instituted this suit on the replevin bond against Bond and Moore. Five pleas were filed by the defendants, which need not be particularly stated, as by the agreement of the parties all errors in pleading were waived. The plaintiff having proved the execution of the bond, and that the appraised value of the prop-

erty mentioned in the recital of the bond, and which had been taken in the distress proceedings therein referred to, was $74.85, rested his case. Whereupon the defendants, to support the issues on their part joined, read in evidence the record of proceedings in the Supreme Court of the District of Columbia, which record at length is omitted by consent, and the following statement of facts in lieu thereof is taken and accepted, to wit:

" 'On the 26th of May, 1877, the Chesapeake & Ohio Canal Co. commenced an action by way of foreign attachment against Savin, the appellant, in the Supreme Court of the District of Columbia, claiming the sum of $143.75 to be due it from the said Savin. Process was issued against Savin, and was returned "cannot be found." On the same day a writ of attachment was also issued to affect the rights and credits of Savin in the hands of the garnishees. The writ, together with interrogatories, was duly served on Bond and Moore on the same day. On the 6th of June, 1877, Moore filed his answer to the writ and interrogatories, and confessed his indebtedness to Savin in the sum of $94.34, adding, "I being security on replevin bond for John Bond for said amount, P. C. Savin distrained John Bond's property for rent; said Bond replevied his goods, and P. C. Savin appealed to Court, and there had a decision in his favor." And on the same day (June 6, 1877) John Bond, the other garnishee, also filed his answer thereto, stating, "I am indebted to P. C. Savin in the sum of $94.34." On the 31st of December, 1877, the following judgment was entered by said Court: "It appearing to the Court that, though the defendant was duly notified of the pendency of this suit by publication, he has not entered his appearance therein; and it appearing that the defendant is indebted to the plaintiff in the sum of $143.75, with interest from November 15, 1876, besides costs; and it appearing by the answer of the said garnishee, Bond, that he is indebted to the said defendant in the sum of $94.35, and no cause having been shown to the contrary, it is considered by the Court that the said sum of $94.35 of the defendant's, so attached by the Marshal as aforesaid, be and the same is hereby condemned in the hands of said garnishees towards the satisfaction of the plaintiff's above demand and costs, and that the plaintiff have execution thereof against the said garnishee, which said judgment was duly entered according to the rules of said Court." '

"The following statement of facts was agreed upon as if they were given in evidence by competent testimony: 'That the

money for which Bond confessed judgment of condemnation, as per record from District of Columbia, offered in evidence by defendants, was money which was payable by Bond to said Savin, as appears by papers in No. 6 Appeals, March Term, 1877, which are to be admitted in evidence, to show value of property seized by the distress, and for all other purposes pertinent to the trial of this cause; that at the time of said judgment of condemnation, confessed by Bond as aforesaid, the Canal Company was indebted to Bond as an employee (subject to exception by the plaintiff as to its admissibility), and that the Canal Company retained from the wages and pay of Bond, with his consent, enough to pay said judgment of condemnation and costs. It is admitted that the defendant can prove that the debt sued for in this action is the same debt or credit that was seized in the attachment proceeding, and, if the Court shall regard this offer as admissible and competent in this action, it shall be regarded as a fact proved in the cause; but the plaintiff does not admit or agree that it is competent and admissible evidence, and reserves his right to object to the same. It is further agreed that *the defendants, Moore and Bond, and the plaintiff, Savin, were each and all citizens and residents of the State of Maryland, and that they were such before and at the time of contracting the debt or obligation sued for in this action, and at the time said attachment was issued and laid, and that the said debt or obligation was and is payable in Maryland.*'

"Upon this statement of facts the plaintiff offered two prayers, as follows:

"1st. That the plaintiff is entitled to recover, notwithstanding the record of proceedings in attachment in the Supreme Court of the District of Columbia, read in evidence by the defendants, and the other evidence in the cause.

"2d. That the said record of proceedings and judgment of condemnation in the Supreme Court of the District of Columbia constitutes no defense to this action, and the plaintiff is entitled to recover the appraised value of the property replevied, as shown by the appraisers, according to the agreed statement of facts.

"These prayers were refused by the Circuit Court, and the prayer of the defendants was granted, instructing the jury that upon the agreed statement of facts and the record from the District of Columbia, given in evidence, the plaintiff is not entitled to recover if the jury find such record offered in evidence is correct.

"It is provided by the Code, Art. X, Sec. 37 (Code of 1888, Art. IX, Sec. 34), that 'any judgment of condemnation against a garnishee and execution thereon, *or payment by such garnishee*, shall be sufficient and pleadable in bar in any action brought against him by the defendant in the attachment for or concerning the property or credits so condemned.'

"In this case it appears that the judgment of condemnation was paid to the Canal Company by Bond, one of the defendants. This was as effective as if the same had been paid by Bond and Moore; and if the judgment of condemnation was valid and conclusive upon Savin, the defendant therein, such payment extinguished the indebtedness of the defendants to the plaintiff. (Drake on Attachments, Sec. 710.)

"The case turns upon the question of the validity and effect of the judgment of condemnation. Under the Constitution of the United States, Art. IV, Sec. 1, 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' (Revised Statutes U. S., Sec. 905.) It was decided in Hughes *v.* Davis, 8 Md., 271, that this provision is applicable to judgments rendered in the District of Columbia.

"In the construction of the constitutional provision the following propositions have been settled by judicial decision:

"1st. That a judgment rendered in one State by a Court having jurisdiction has in every other State the faith and credit of a domestic judgment. (Bank United States *v.* Merchants' Bank, 7 Gill, 430.)

"2d. In support of such judgment jurisdiction is presumed, and the *onus* of disproving it rests upon the party assailing it. This was decided in the case last above cited, and also in Bissel *v.* Briggs, 9 Mass., 462, and Scott *v.* Coleman, 5 Littell (Ky.), 349.

"3d. The service of process upon Bond and Moore, the garnishees, within the District of Columbia gave the Supreme Court jurisdiction to render the judgment in question. (Cooper *v.* Reynolds, 10 Wall., 316; Starbuck *v.* Murray, 5 Wend., 148; Blyler *v.* Kline, 14 P. F. Smith, 130; Taylor *v.* Phelps, 1 H. & G., 501.) In this case the judgment relied on by the defendants comes incidentally in question. In such case it is laid down in Taylor *v.* Phelps, 1 H. & G., 501, that if it 'be by a Court of competent jurisdiction, it has the force and effect of a domestic judgment, and the correctness of it cannot be examined into, but it is conclusive.' We refer also to Barney *v.* Patterson, 6 H. & J., 182.

"*The objection made by the appellant that the garnishee was*

not a citizen of the District of Columbia is without force. His debt to the appellant was payable wherever he was found (Turner v. Williams, 26 E. C. L., 110), and process having been served upon him, the Supreme Court of the District had unquestionable jurisdiction to render the judgment; and the same having been paid, it follows that there was no error in granting the prayer of the appellees and refusing those of the appellant. Judgment affirmed."

It is difficult to find a case which more clearly bears out the contention of the plaintiff in error than the rules laid down in the above-cited case, and if there remains any doubt upon the subject it must be cleared away by the language of the Supreme Court of the United States in C., R. I. & P. Ry. *v.* Sturm, 174 U. S., 710, from which the following copious quotations are taken:

"How proceedings in garnishment may be availed of in defense—whether in abatement or bar of the suit on the debt attached or for a continuance of it or suspension of execution—the practice of the States of the Union is not uniform. *But it is obvious and necessary justice that such proceedings should be allowed as a defense in some way.*

"In the pending suit plaintiff in error moved for a continuance, and not securing it, pleaded the proceedings in garnishment in answer. Judgment, however, was rendered against it and sustained by the Supreme Court on the authority of M. P. Ry. *v.* Sharritt, 43 Kans., 375, and 'for the reasons stated by Mr. Justice Valentine in that case.' The facts of that case were as follows: The Missouri Pacific Railway Co. was indebted to Sharritt for services performed in Kansas. Sharritt was indebted to one J. P. Stewart, a resident of Missouri. Stewart sued him in Missouri and attached his wages in the hands of the Railway Company, and the latter answered in the suit, in accordance with the order of garnishment on the 28th of July, 1887, admitting indebtedness, and on the 29th of September was ordered to pay its amount into Court. On the 27th of July Sharritt brought an action in Kansas against the Railway Company to recover for his services, and the company, in defense, pleaded the garnishment and order of the Missouri Court. The amount due Sharritt having been for wages, was exempt from attachment in Kansas. It was held that the garnishment was not a defense. The facts were similar, therefore, to those of the case at bar.

"The ground of the opinion of Mr. Justice Valentine was that

the Missouri Court had no jurisdiction, because the *situs* of the debt was in Kansas. In other words, and to quote the language of the learned justice, 'the *situs* of a debt is either with the owner thereof, or at his domicile, or where the debt is to be paid, and it cannot be subjected to a proceeding in garnishment anywhere else. * * * It is not the debtor who can carry or transfer or transport the property in a debt from one State or jurisdiction into another. The *situs* of the property in a debt can be changed only by the change of location of the creditor who is the owner thereof, or with his consent.'

"The primary proposition is that the *situs* of a debt is at the domicile of the creditor, or, to state it negatively, it is not at the domicile of the debtor. The proposition is supported by some cases; it is opposed by others. Its error proceeds, as we conceive, from confounding debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative but different things, and the law, in adapting its remedies for or against either, must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstanding. This Court said by Mr. Justice Gray in Wyman *v.* Halstead, 109 U. S., 654, 'the general rule of law is well settled that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor.' And this is not because of defective title in the creditor or in his administrator, but because the policy of the State of the debtor requires it to protect home creditors. Wilkins *v.* Ellett, 9 Wall., 740; 108 U. S., 256. Debts cannot be assets at the domicile of the debtor if their locality is fixed at the domicile of the creditor, and if the policy of the State of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings. For illustrations in matters of taxation, Kirtland *v.* Hotchkiss, 100 U. S., 491; Pullman Car Co. *v.* Pennsylvania, 14 U. S., 18; Savings and Loan Society *v.* Multnomah County, 169 U. S., 421. Our attachment laws had their origin in the custom of London, Drake, Sec. 1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard. (Andrews *v.* Clerke, 1 Carth., 25.) * * * The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up, the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is neces-

sary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and *considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor.* He, and he only, has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. (Mooney *v.* Buford, 72 Fed., 32; Conflict of Laws, Sec. 549.) To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.

"Besides the proposition which we have discussed, there are involved in the decision of the Sharritt case the propositions that a debt may have a *situs* where it is payable, and that it cannot be made migratory by the debtor. The latter was probably expressed as a consequence of the primary proposition, and does not require separate consideration. Besides, there is no fact of change of domicile in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the State, and was such at the time the debt sued on was contracted, and we are not concerned to inquire whether the cases which decide that a debtor temporarily in a State cannot be garnished there, are or not justified by principle. The proposition that the *situs* of a debt is where it is to be paid is indefinite. '*All debts are payable everywhere unless there be some special limitation or provision in respect to the payment, the rule being that debts, as such, have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor every-*

where.' 2 Parsons on Contracts, 8th Ed., 702 (9th Ed., 739). *The debt involved in the pending case had no 'special limitation or provision in respect to payment.' It was payable generally, and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best-considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose.* * * * It follows from these views that the Iowa Court had jurisdiction, and that the Kansas Courts did not give the proceedings in Iowa the faith and credit they had there and were hence entitled to in Kansas."

The foregoing opinion treats also of the subject of exemptions, and mentions the duty of the garnishee to notify his creditor of the attachment proceedings, but neither of these questions arise in this case. The question of exemptions was raised, it is true, but was disposed of in the first opinion by the Supreme Court of North Carolina (Record, p. 20). The question of notice has never been raised, nor could it have been successfully urged, as the record discloses that ample notice was given to have enabled Balk to have availed himself of any good defense he might have had. Balk sued Harris before the justice of the peace on August 11, 1896, just five days after the attachment was served (Record, pp. 5-27), and Harris filed his answer (Record, pp. 6-28), setting up as his defense the Maryland proceedings, thus giving due notice. The date of the answer does not appear, but it was filed prior to the date on which the magistrate rendered his judgment, September 2, 1896 (Record, pp. 9-32), so that this notice was given within a few days after the attachment. Under the laws of Maryland (Code, Art. IX, Sec. 12) Balk had a year and a day from the return-day of the attachment in which to appear to the action and make defense and defeat it if his defense were good; so that he had an abundance of notice, but failed to avail himself of it, for the manifest reason that he had no defense to make, as *he states in his own testimony* (Record, p. 18): *"I owe Jacob Epstein about* $344. *I did not wish him to make me a present of the debt."* This being true, it is difficult to see how he was prejudiced by the attachment, as it amounted to nothing more in effect than an involuntary payment by him on account of an admittedly honest indebtedness.

Applying the language of the Court in C., R. I. & P. Ry. *v.* Sturm, 174 U. S., 710, to the case at bar, it will be observed that *the debt in this case was "payable generally and without any*

special limitation or provision in respect to payment." It is most earnestly contended by the plaintiff in error, in reliance upon the above authority, that the *situs* has nothing in common with the principles governing this case; that the sole question, outside of the validity of the statutory proceedings in Maryland, is whether or not Balk could have sued Harris for the debt in the Maryland Courts on August 6, 1896, the date the attachment was sued out, and if he could, then the debt was attachable in Maryland. As he had the unquestionable right to do so under the laws and decisions of Maryland, as well as the constitutional right, the question is fully answered.

Harris *had* property in the State of Maryland at the time of the issuing of the attachment—the goods which he had purchased; so that clears up possible contention on that point.

It is immaterial whether the garnishee be temporarily within the State if he could be sued there by his creditor; and this being the true test, and having been applied with the result that it cannot be questioned that Balk had the right to sue Harris in Maryland at that time had he seen fit to do so, it entirely disposes of that question.

It is submitted, however, that a discussion of *situs* at all is a departure from the true issue involved in the case. The application of any doctrine of *situs* is denied for the reason that it contemplates a *res*, or an action *in rem*. This case, as has been clearly demonstrated, was an action which resulted in a judgment *in personam* against Harris. *Was it a good judgment in Maryland? If so, it must be recognized in North Carolina and elsewhere. This is the sole question.*

Aside from the statute law of Maryland and the decisions of its Courts referred to hereinbefore in support of this contention, other Courts have gone to considerable length in sustaining this position. Minor on Conflict of Laws, Sec. 125 and notes, in commenting on the case of Mooney *v.* Buford, 72 Fed., 32, uses these words: "A garnishment is a proceeding *in personam*. This is contrary to the usually-accepted idea, but it is believed the Court is correct. The attachment is a proceeding *in rem*, the *res* being the general liability of the debtor, which general liability, upon its seizure by the attaching creditor, can be rendered fixed and definite only by a proceeding *in personam* against the debtor, that is, by garnishment."

And to quote some of the language of the Court in the said case of Mooney *v.* Buford, 72 Fed., 32: "The decisions cited

proceed upon the assumption (which we think clearly erroneous) that jurisdiction in garnishment against a debtor of the principal defendant, who cannot be personally served with process, depends, where tangible property has not been attached, upon the *situs* of the debt. The assumption makes garnishment impossible in cases of foreign attachment whether the debtor sought to be reached is a resident or a non-resident. Escape is sought from this result by saying, as in Douglas *v.* Insurance Co., 'that the laws of a State, for the purposes of attachment proceedings, may fix the *situs* of a debt at the domicile of the debtor.' That is a sheer fiction. * * * No such fiction, however, is necessary, because the jurisdiction in such a case does not depend upon the *situs* of the debt, but upon control of the debtor, obtained by means of due process, duly served. Even if, as in cases of domestic attachment, the creditor and the *situs* of the debt be within the State, effective jurisdiction in garnishment can be acquired only by the service of process upon the debtor. It is notice to the debtor that gives the plaintiff in garnishment a lien upon the debt or an assignment of it, and once that is accomplished, notice by publication, or in such other manner as may be provided by statute, may be given to the principal defendant, upon which the Court may proceed to final judgment, disposing of the debt as effectively as, upon like notice by publication, it may dispose of a chattel seized in attachment. * * * No Court can rightfully disregard the lien upon the debt which is established by the service of process in garnishment upon the debtor."

These principles are elaborately discussed and ably disposed of in the opinion of the Vice-Chancellor in the case of National Fire Insurance Co. *v.* Chambers, 53 N. J. Eq., 468.

Page 482: " * * * The burden of the argument * * * was that the debt due from the complainant to Chambers had its *situs* in New Jersey, and therefore was not within the jurisdiction of the Pennsylvania Courts. But the difficulty with this argument is that it goes too far, and would defeat all foreign attachments so far as relates to reaching debts due the defendant in attachment, because they would all be held to have their *situs* with the non-resident defendant out of the State, and so be beyond the jurisdiction of the State. Some confusion and seeming inconsistencies are found in the books growing out of a failure to distinguish between the character of the two kinds of chattels which are sought to be reached by foreign attachment, viz.,

tangible chattels and choses in action. In order to obtain a lien upon tangible chattels, which alone are subject to seizure and levy, it is necessary that there should be an actual or constructive manucaption by the officer. * * * To effect this actual seizure and levy it is necessary that the chattel should be within the jurisdiction and within the physical power and reach of the officer. Hence the canon that the *res* must be within the jurisdiction. The failure to distinguish in this respect between tangible chattels and choses in action has led to the erroneous notion that the debt or right of action, in order to be reached, must also be within the jurisdiction. But this is not so, for the reason that the debt is incapable of actual seizure, and hence none is necessary. On this point I adopt the language of the Supreme Court of Vermont in Cohoon *v.* Morgan, 38 Vt., 236: 'It is true that the trustee process is sometimes called "attaching a debt," because it creates a lien upon the debt as attachment does upon personal property. But the validity of the two kinds of liens rests on wholly different grounds. Attachment of personal property must be by taking possession of it. But no possession can be taken of a debt. To make the lien valid against the debt all that is required is notice to the debtor (garnishee) of the suit, a mere summons.' * * * It follows that the real and only liability of a party as garnishee is by reason of his owing a debt to the defendant in the suit, and the garnishment consists in nothing more than a 'warning' to him not to pay the debt to his creditor until the plaintiff's debt is satisfied. In process of garnishment, as thus understood, the fact that the debt subject to be garnished has its *situs* out of the jurisdiction has never been held to stand in the way of the process of the Court. I come, therefore, to the conclusion that the real and only ground of jurisdiction in case of attachment over choses in action is the service, within the jurisdiction, of warning upon the debtor; and when this is done jurisdiction is obtained. * * * "

Page 485: "The old practice in the city of London Courts * * * agrees with that upheld by the Courts of this country in the numerous cases above cited. The mere fact that the legal domicile of the garnishee is without the jurisdiction is not a protection against garnishment. * * * "

Page 491: "And I further suggest that the fact that a party owing a debt may be subjected to the injury of being compelled to pay it twice—once directly to his creditor, and then again to a third person for the benefit of his creditor, and so, in effect,

indirectly to his creditor a second time—has always been treated by Courts desiring to do justice as a matter of serious consideration, and, in fact, the one thing to be guarded against. * * * "

Page 497: "Proof was made to the satisfaction of the Court of the debt due from him to Harding, Whitman & Co., and they have, besides, sued in this State and obtained judgment, after personal service upon him, for the debt. It will be no injustice to him to apply this debt of the complainant to him toward the payment of his indebtedness, *pro tanto,* to Harding, Whitman & Co. But it will be a great injustice to complainant to compel it to pay this debt twice."

In conclusion, the plaintiff in error earnestly asserts the same proposition, for, aside from the sound legal position upon which he rests with confidence, it would be most inequitable and unjust to charge him with double liability, and thus force the payment of the debt twice. For these reasons the plaintiff in error respectfully submits that the judgment of the Supreme Court of North Carolina should be reversed.

GEORGE W. S. MUSGRAVE,

SYLVAN HAYES LAUCHHEIMER,

Attorneys for Plaintiff in Error.

Since the case has been pending in this Court, the senior counsel, Mr. Charles F. Warren of Washington, North Carolina, has departed this life. He was active in the conduct of the case from the beginning and was intensely interested in the legal questions involved, and as he cannot now take part in its final argument, it is but fitting, in respect to his memory, to make this mention of him upon the Brief, a portion of which is taken from his own work. Always conscientious and able, characteristic of the school of gentlemen and lawyers of which he was an honored member, his loss is keenly felt.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 191.

ISAAC H. HARRIS, PLAINTIFF IN ERROR,

v.

B. BALK.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

It appears to be necessary to restate briefly the facts in the case. Both the plaintiff in error, Isaac H. Harris, and the defendant, B. Balk, were residents of the State of North Carolina. Jacob Epstein was a resident of the city of Baltimore, State of Maryland. During June and July, 1896, B. Balk loaned Isaac H. Harris several sums of money aggregating one hundred and eighty dollars ($180), which Harris verbally promised to repay; but there was no written evidence of the obligation. The indebtedness was to be paid in the State of North Carolina. At the same time Jacob Epstein, a wholesale merchant in Baltimore, contended that B. Balk was indebted to him and in the amount of about three hundred dollars ($300).

About August, 1896, Isaac H. Harris visited Baltimore

for the purpose of purchasing merchandise, and while in that city temporarily—that is to say, on August 6, 1896—Jacob Epstein attempted to institute suit against B. Balk as a non-resident of Baltimore and to garnishee said Isaac H. Harris on the said day. Said Harris did not possess at the time any of the identical money which he had borrowed from said Balk. On the following day, August 7, 1896, said Harris left Baltimore on his return to his home in Washington, North Carolina. Said Harris did not employ any lawyer to represent him in the garnishee proceeding instituted against him and did not contest the garnishee process, although the record of the Maryland judgment purports to show that one W. N. Ewing, without authority, attempted to enter up a confession for said Harris. (See Record, page 13.) After the return of Harris to his home in North Carolina he made an affidavit on August 11, 1896, that he owed Balk one hundred and eighty dollars, and stated that the amount had been attached by Jacob Epstein, of Baltimore, and presumably forwarded this affidavit to Baltimore. (See Record, page 13.) Said Harris admitted the above-stated facts. (See Record, page 17.) On the same day that said Harris made the voluntary affidavit of indebtedness to said Balk, said Balk instituted suit against Isaac H. Harris, before a justice of the peace in North Carolina, by the issuing of a summons which was duly served on said Harris on the same day. After this date the said Harris paid to C. F. Warren, an attorney of Jacob Epstein residing in North Carolina, the said sum of one hundred and eighty dollars. The date of this payment is not stated, but presumably it was not paid until after the entry of the garnishee judgment in the Maryland court, which must have been made some days after the forwarding of the affidavit.

No execution was issued upon the alleged garnishee judgment in the Maryland courts. Said Harris contends that he was compelled to pay said judgment by reason of the fear

that certain goods which he had purchased from wholesale merchants in Baltimore would be seized under execution. This contention must necessarily be a fiction, because said Harris had no property in the merchandise so purchased before delivery, and they could not have been attached in the hands of the common carrier after delivery to the latter and bill of lading issued for transportation from Baltimore into another State. It is not contended that said Harris had any other property in Maryland. The payment was entirely voluntary.

It is not necessary to refer in detail to the several trials in the courts of North Carolina before the justice of the peace by appeal in the superior court and the hearing of the several appeals in the supreme court of North Carolina.

It is apparent there has been collusion between Jacob Epstein and the plaintiff in error, Isaac H. Harris, since the inception of the attempted garnishee proceeding in Maryland. It is only necessary to point out the visit of said Harris to Baltimore at the opportune time, the unauthorized appearance of attorney W. N. Ewing, the voluntary furnishing of the affidavit admitting the indebtedness to Balk made after he had returned to North Carolina, the payment of the money by Harris to the attorney of Epstein in North Carolina and the appearance of the same attorney for said Harris in the courts of North Carolina in the suit of Balk *vs.* Harris, the appearance in the same action for Harris of the same attorney in Baltimore who represented Epstein in the garnishee proceeding, and the apparent disclosure in the record of the fact that said Epstein had been in reality defending for Harris the suit instituted against him by Balk. It is true that Harris attempted to deny this collusion, but the mere denial cannot avail against the above facts and others apparent in the record.

ARGUMENT.

The plaintiff in error pleaded in bar of the suit brought by the defendant in error the Maryland judgment and contended that it was conclusive against the defendant in error in this action. He further contends that the said judgment was a valid judgment in Maryland and was therefore entitled to full faith and credit in the courts of North Carolina. If the Maryland court had and exercised jurisdiction of Balk and the garnishee Harris and also of the *res*, these contentions would be correct.

On the other hand, the defendant in error contends that the Maryland court, in the garnishment proceeding of Jacob Epstein *v.* Balk and the garnishee, Harris, was without jurisdiction, and that the said judgment could be collaterally attacked in the courts of North Carolina.

The jurisdiction of the Maryland court may be attacked in this action, and even to the extent of contradicting the recital contained in the record.

Thompson *v.* Whitman, 18 Wallace, 457.
Knowles *v.* Gaslight & Coke Co., 19 Wallace, 58.
Kilbourn *v.* Thompson, 103 U. S., 198.
Noble *v.* Union River Logging R. R., 147 U. S., 173.
Greenleaf on Evidence (Lewis edition), vol. 1, sec. 548.

If Balk had no property within the State of Maryland, the Maryland court was without jurisdiction.

Pennoyer *v.* Neff, 95 U. S., 714.

Facts essential to establish the jurisdiction of the State court must appear affirmatively by allegation or affidavit before the process of the court can issue authorizing the attachment or garnishment of the *res*. This is true even if such essential fact is subsequently disclosed during the pendency of the action. This is also true, although the statute

of the State may not require such jurisdictional fact to be alleged as a prerequisite to the issuing of the writ of condemnation. It does not appear in the affidavit made by Epstein in the Maryland court that any allegation was made that Balk owned property within the State of Maryland. (See Record, p. 11.)

While the debtor (the defendant) and the garnishee are both non-residents, no garnishment process can issue against such non-resident temporarily in the State at the instance of a plaintiff domiciled in the State.

A non-resident cannot be held as garnishee.

Rood on Garnishment, p. 21, note 5, sec. 15.

One who is only temporarily in a State and in which he does not reside cannot be subjected to garnishment.

Waples on Attachment and Garnishment, 227–228.

Drake on Attachment, 5th ed., secs. 474–476.

Everett *v.* Connecticut, &c., Co., 4 Colo. App., 513; 36 Pac., 617.

The majority of the decisions hold that where personal jurisdiction cannot be acquired over the defendant on account of his being a non-resident the plaintiff cannot garnishee a non-resident while temporarily within the State.

Am. & Eng. Enc. of Law, second edition, vol. 14, p. 803, and the decisions cited in note 2 on said page.

It has been held that a citizen of Maine, having his home and domicile there, was not liable to be sued as trustee of a citizen of Maine, in the courts of Massachusetts, under the trustee attachment process, notwithstanding his business in the coasting trade compelled him to pass about half his time in Massachusetts.

Peters *v.* Rogers, 5 Mason (U. S.), 555.

By the custom of London no person could be summoned as trustee or garnishee unless he resided within the jurisdiction of the court.

See cases cited in note 2, p. 815, Am. & Eng. Enc. of Law, second edition.

A State court cannot issue garnishment process against a non-resident temporarily in the State, and if such process is issued the court is without jurisdiction unless it is made to appear that he has in his possession tangible property of the defendant or is bound to pay the defendant money or deliver him property within the State.

Penn. R. R. Co. *v.* Rogers, 52 W. Va., 250; S. C., 62 L. R. A., 178.

In the above case this proposition is discussed from pages 182 to 187, inclusive, in L. R. A. and cases cited to sustain the proposition.

The fact that the garnishee is a non-resident and only temporarily within the State is a jurisdictional question and not personal to the garnishee.

Shinn on Attachment and Garnishment, p. 860, sec. 491, and cases cited.

Rindge *v.* Green, 52 Vermont, 204.

In a personal action brought in a State court against a corporation which is neither incorporated nor does business within the State, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, cannot be recognized as valid by the courts of any other State.

Goldey *v.* Morning News, 156 U. S., 518.

As showing that there must have been collusion between the garnishee Harris and Epstein, and that he did not pay the alleged garnishee judgment under compulsion or execution, but paid it voluntarily, and, further, that the alleged

garnishee judgment could not have been enforced as against Harris, because Harris had left the State of Maryland and returned to his home in North Carolina and had no property within the State of Maryland, I submit the proposition that the mere order of Harris given to wholesale merchants for merchandise and while in possession of the latter did not constitute property, and, further, that after said merchandise had been delivered to the common carrier for shipment from Baltimore to North Carolina the said merchandise could not have been garnisheed in the hands of the common carrier.

Baldwin *v.* Great Northern Ry. Co. (Minn.), 51 L. R. A., 640; 64 L. R. A., 625, cases cited in brief.

Garnishment statutes are strictly construed as against the party resorting to the remedy.

State Bank *v.* Hinton, 1 Dev. Law (12 N. C.), 397.

A garnishee who has paid under an invalid judgment cannot plead the same in bar.

Merriam *v.* Rundlett, 13 Pick. (Mass.), 511, cited in Rood on Garnishment, sec. 208, in note.

If the garnishee can show that the attorney who purported to appear for him had no authority, the appearance so entered will be void. Harris testified in this suit that he did not employ any attorney to represent him in the garnishment proceeding in the Maryland court. (See Record, pages 17 and 47.)

Moore *v.* Wayne Circuit Judge, 55 Mich., 84.

Pettit *v.* Muskegon Booming Co., 74 Mich., 214.

In the record of the Maryland action there is no adjudication that Balk was indebted to Epstein. This adjudication was absolutely essential to give efficacy to the adjudication of the condemnation of the debt from Harris to Balk. It is true that it appears that Epstein "made oath on the five

books of Moses" that Balk was indebted to him, but, as stated, it was further necessary that the court should make an adjudication upon this alleged indebtedness. This was not necessary for the purpose of founding a judgment *in personam* against Balk, but for the purpose of giving the court jurisdiction to issue the garnishment process. This defect is not cured by the admission of Balk in this North Carolina suit that he was indebted to Epstein. The garnishment proceeding cannot be aided by anything occurring subsequently and in another action. This is a jurisdictional defect.

As bearing upon the proposition that the Maryland court could not garnishee a non-resident temporarily within the State, I will refer to a statute and decision in Maryland. The act of the legislature of Maryland of 1868, chapter 471, section 211, provides that "Suits against a foreign corporation, exercising franchises in this State may be brought by a resident of this State, for any cause of action; and by a plaintiff not a resident of this State, when the cause of action has arisen, or the subject of the action shall be situated in this State." In considering the above statute, it was held that a citizen of Maryland could not sue a non-resident and garnishee a foreign corporation doing business in Maryland when the cause of action or contract of insurance was not consummated in Maryland.

Myer *v.* Insurance Co., 40 Md., 595.
Cromwell *v.* Insurance Co., 49 Md., 366.

The plaintiff in error appears to rely with confidence upon the opinion of the court in Chicago, &c., Ry. *v.* Sturm, 174 U. S., 710.

In that case this court expressly refrained from holding that a garnishment process against a non-resident temporarily in the State was valid and gave the court jurisdiction.

The court quotes from Andrews' case (the custom of London), as follows:

"For it was always the custom in London to attach debts * * * if the goldsmith who gave the note on the person to whom the bill is directed, *liveth within the city*, without any respect had to the place where the debt was contracted."

The court further say that the essential service of foreign attachment is to reach the *res*, and to do it one must go to the domicile of his debtor. Again, the court say, "the plaintiff in error was not temporarily in Iowa," but that it was an incorporation of such State, and therefore domiciled in the State. The proposition that a State court is without jurisdiction to issue garnishment process against a non-resident temporarily in the State, unless he has in his possession property of the defendant or is bound to pay the defendant money or deliver him property within the State, and, further, that the case of Chicago, &c., Ry. *vs.* Sturm, *supra*, does not hold to the contrary, is most ably discussed and upheld in Penn. R. R. Co. *vs.* Rogers (W. Va.), *supra*.

This court has never held, so far as I am aware, that a State court had jurisdiction to issue garnishment process against a non-resident, and the uniform decisions in a majority of the States in which the question has been presented have been to the effect that State courts were without such jurisdiction, and that it was a jurisdictional defect which could not be waived by the garnishee and had no binding effect upon the rights of the non-resident creditor. Even if the Maryland court has held to the contrary in the case of Savin *v.* Bond, as cited in the brief of plaintiff in error (p. 20) such decision has no binding effect upon this court, and only this court has authority to declare the law as to the limit of jurisdiction of State courts in suits against non-residents and to define the faith and credit which they shall receive in the courts of other States.

If the plaintiff in error has paid Epstein under a void judgment of the court of Maryland he cannot be heard to complain because he shall be compelled again to pay this debt to his rightful creditor, Balk, and doubtless the same

kind and generous hand of Epstein will continue to be extended to the plaintiff in error, and thereby save him from the loss of double payment.

In conclusion, the defendant in error submits that the Maryland court was without jurisdiction and that its process of garnishment and attempted condemnation of the *res* was void, and that the alleged judgment was not entitled to faith and credit by the courts of North Carolina.

JNO. H. SMALL,
Attorney for B. Balk, Defendant in Error.

Supreme Court of the United States.

No. 191.—October Term, 1904.

Isaac N. Harris, Plaintiff in Error, vs. B. Balk. } In error to the Supreme Court of the State of North Carolina.

[May 8, 1905.]

The plaintiff in error brings the case here in order to review the judgment of the Supreme Court of North Carolina, affirming a judgment of a lower court against him for $180, with interest, as stated therein. The case has been several times before the Supreme Court of that State, and is reported in 122 N. C. 84, again, 124 N. C. 467; also in 130 N. C. 981. The opinion, delivered at the time of entering the judgment now under review, is to be found in 138 N. C. 38; and see also 132 N. C. 10

The facts are as follows: The plaintiff in error, Harris, was a resident of North Carolina at the time of the commencement of this action in 1896, and prior to that time was indebted to the defendant in error, Balk, also a resident of North Carolina, in the sum of $180, for money borrowed from Balk by Harris during the year 1896, which Harris verbally promised to repay, but there was no written evidence of the obligation. During the year above mentioned one Jacob Epstein, a resident of Baltimore, in the State of Maryland, asserted that Balk was indebted to him in the sum of over $300. In August, 1896, Harris visited Baltimore for the purpose of purchasing merchandise, and while he was in that city temporarily on August 6, 1896, Epstein caused to be issued out of a proper court in Baltimore a foreign or non-resident writ of attachment against Balk, attaching the debt due Balk from Harris, which writ the sheriff at Baltimore laid in the hands of Harris, with a summons to appear in the court at a day named. With that attachment, a writ of summons and a short declaration against Balk, (as provided by the Maryland statute,) were also delivered to the sheriff and by him set up at the court house door, as required by the law of Maryland. Before the return day of the attachment writ Harris left Baltimore and returned to his home in North Carolina. He did not contest the garnishee process, which was issued to garnish the debt which Harris owed Balk. After his return Harris made an affidavit on August 11, 1896, that he owed Balk $180, and stated that the amount had been attached by Epstein of Baltimore, and by his counsel in the Maryland

proceeding Harris consented therein to an order of condemnation against him as such garnishee for $180, the amount of his debt to Balk. Judgment was thereafter entered against the garnishee and in favor of the plaintiff, Epstein for $180. After the entry of the garnishee judgment, condemning the $180 in the hands of the garnishee, Harris paid the amount of the judgment to one Warren, an attorney of Epstein, residing in North Carolina. On August 11, 1896, Balk commenced an action against Harris before a justice of the peace in North Carolina, to recover the $180 which he averred Harris owed him. The plaintiff in error, by way of answer to the suit, pleaded in bar the recovery of the Maryland judgment and his payment thereof, and contended that it was conclusive against the defendant in error in this action, because that judgment was a valid judgment in Maryland, and was therefore entitled to full faith and credit in the courts of North Carolina. This contention was not allowed by the trial court, and judgment was accordingly entered against Harris for the amount of his indebtedness to Balk, and that judgment was affirmed by the Supreme Court of North Carolina. The ground of such judgment was that the Maryland court obtained no jurisdiction to attach or garnish the debt due from Harris to Balk, because Harris was but temporarily in the State, and the situs of the debt was in North Carolina.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The State court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is, whether it did not thereby refuse the full faith and credit to such judgment which is required by the Federal Constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation, because the garnishee, although at the time in the State of Maryland, and personally served with process therein, was a non-resident of that State, only casually or temporarily within its boundaries; that the *situs* of the debt due from Harris, the garnishee, to the defendant in error herein was in North Corolina, and did not accompany Harris to Maryland; that, consequently, Harris, though within the State of Maryland, had not possession of any property of Balk, and the Maryland State court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in

error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that State provide for an attachment of this nature, if the debtor, the garnishee, is found in the State and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the State court obtains no jurisdiction over the garnishee if he be but temporarily within the State, proceed upon the theory that the *situs* of the debt is at the domicil either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another State, and the garnishee has no possession of any property or credit of the principal debtor in the foreign State.

We regard the contention of the plaintiff in error as the correct one. The authorities in the various State courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the State providing for and permitting the attachment it cannot be levied there. If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that State. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the State where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues. (*Blackstone* v. *Miller*, 188 U. S. 189–206.) If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the *situs* of the debt was originally. We do not see the materiality of the expression "*situs* of the debt," when used in connection with attachment proceedings. If by *situs* is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the *situs* thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign State when therein sued upon his obligation by

his creditor, as he was in the State where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defence to such suit for the debtor to plead that he was only in the foreign State casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign State after personal service of process therein, just as well as by the courts of the domicil of the debtor. If the debtor leave the foreign State without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other State where the debtor might be found. In such case the situs is unimportant. It is not a question of possession in the foreign State, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the State where the attachment is laid. His obligation to pay to his creditor is thereby arrested and a lien created upon the debt itself. (*Cahoon* v. *Morgan*, 38 Vt. 236; *National Fire Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468, 483.) We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that State and its laws permitted the attachment.

There can be no doubt that Balk, as a citizen of the State of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several States, one of which is the right to institute actions in the courts of another State. The law of Maryland provides for the attachment of credits in a case like this. See sections 8 and 10 of Article 9 of the Code of Public General Laws of Maryland, which provide that, upon the proper facts being shown (as stated in the article,) the attachment may be sued out against lands, tenements, goods and credits of the debtor. Section 10 particularly provides that "Any kind of property or *credits* belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Sections 11, 12 and 13 of the above-mentioned article provide the general practice for levying the attachment and the proceedings subsequent thereto. Where money or credits are attached the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. (*Bushman* v. *Hanna*, 72 Md.

1, 5, 6.) Section 34 of the same Maryland Code provides also that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.

It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there; it also appears that the municipal law of Maryland permits the debtor of the principal debtor to be garnished, and therefore if the court of the State where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the State, then the judgment entered is a valid judgment. See Minor on Conflict of Laws, section 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the State is but temporary. See pp. 289, 290. This is the doctrine which is also adopted in *Morgan* v. *Neville*, (74 Pa. St. 52,) by the Supreme Court of Pennsylvania, per Agnew, J., in delivering the opinion of that court. The same principle is held in *Wyeth* v. *Lang*, (127 Mo. 242, 247;) in *Lancashire Insurance Co.* v. *Corbetts*, (165 Ill. 592;) and in *Harvey* v. *Great Northern R. R. Co.*, (50 Minn. 405, 406, 407;) and to the same effect is *Embree* v. *Hanna*, (5 Johns. [N. Y.] 101;) also *Savin* v. *Bond*, (57 Md. 228,) where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there; that as his debt to the appellant was payable wherever he was found, and process had been served upon him in the District of Columbia, the Supreme Court of the District had unquestioned jurisdiction to render judgment, and the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case in 138 N. Y. 209 (*Douglas* v. *Insurance Co.*) is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the State of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the State of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that State. The general principle laid down in *Embree* v. *Hanna*, (5 Johns. [N. Y.] 110,) was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled.

It seems to us, however, that the principle decided in *Railroad Co.* v. *Sturm*, (174 U. S. 710,) recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely a temporary

one in the State where the process was served. In that case it was said: "All debts are payable everywhere unless there be some special limitation or provision in respect to the payment; the rule being that debts, as such, have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere. (2 Parsons on Contracts, 8th ed. 702 (9th ed. 739.) The debt involved in the pending case 'had no special limitation or provision in respect to payment.' It was payable generally, *and could have been sued on in Iowa, and therefore was attachable in Iowa.* This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose." The case recognizes the right of the creditor to sue in the State where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign State, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign State is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign State his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the State where the attachment was sued out permits it.

It seems to us, therefore, that the judgment against Harris in Maryland, condemning the $180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the State of Maryland.

It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment. It is objected, however, that the payment by Harris to Epstein was not under legal compulsion. Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defence to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defence, there was no reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could

not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here.

But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defence. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of *Morgan* v. *Neville*, (74 Pa. St. 52,) and is spoken of in *Railroad Co.* v. *Sturm*, *supra*, although it is not therein actually decided to be necessary, because in that case notice was given and defence made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee, (the proper publication being made by the plaintiff,) we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee. In this case, while neither the defendant nor the garnishee appeared, the court, while condemning the credits attached, could not, by the terms of the Maryland statute, issue the writ of execution unless the plaintiff gave bond or sufficient security before the court awarding the execution, to make restitution of the money paid if the defendant should, at any time within a year and a day, appear in the action and show that the plaintiff's claim, or some part thereof, was not due to the plaintiff. The defendant in error, Balk, had notice of this attachment, certainly within a few days after the issuing thereof and the entry of judgment thereon, because he sued the plaintiff in error to recover his debt within a few days after his (Harris') return to North Carolina, in which suit the judgment in Maryland was set up by Harris as a plea in bar to Balk's claim. Balk, therefore, had an opportunity for a year and a day after the entry of the judgment to litigate the question of his liability in the Maryland court and to show that he did not owe the debt, or some part of it, as was claimed by Epstein. He, however, took no proceedings to that end, so far as the record shows, and the reason may be supposed to be that he could not successfully defend the claim, because he admitted in this case that he did, at the time of the attachment proceeding, owe Epstein some $344.

Generally, though, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his

creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice.

The judgment of the Supreme Court of North Carolina must be reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

Mr. Justice HARLAN and Mr. Justice DAY dissented.

True copy.

Test:

Clerk Supreme Court, U. S.